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CONTENTS

The applied in the General Government in 1939-1945 substantive criminal law

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Abstract

After the end of hostilities in October 1939, Germany has made a division of the occupied territories of the Polish state. The northern and eastern regions (including Greater Poland, Silesia, Eastern Pomerania) were incorporated into the Third Reich. From the remaining areas (Little Poland Mazovia, Lublin region) was on 26.10.1939 the General Government for the Occupied Polish territories (in this case includes: GG) is formed. On 07/31/1940 its name was changed to the General Government. This was divided into four districts: Warsaw, Radom, Lublin and Krakow. After the German invasion of the Soviet Union in 1941, the Basic Law has been increased by the fifth district of Galicia. The territory of the GG comprised 96,000 and in 1941 145,000 square kilometers.[*1]

The General was a structure of an unclear structural-legal position. The fluctuation and uncertainty are likely due to the changing political concepts in government circles of the Third Reich on the fate of these

areas that have been affected to a large extent by the situation on the fronts of II. World War. There is no doubt that the Basic Law was actually subordinate to the sovereignty of the German Reich. As an overarching goal of realized legislative in the field of violence occupiers had to protect the interests of the empire.[*2]

Criminal law should be treated in the field of GG during the II. World War as a term that had a diverse character. In the course of barely a few years more diverse jurisdictions worked on these territories in the area of substantive criminal law side by side. The occupiers chose here for an unusual solution. It was created a two-tier legal system. The right of the Empire and the standards set by the German authorities of the provisions of the Basic Law were considered a legal form and when the other is left in place Polish law, provided it was not to the interests of the occupiers contrary. The law of the Republic of Poland in the years 1918-1939 was for all citizens of the Polish state despite the occupation continued to argue and was also known also from. Polish Underground State acknowledged. Complementing this is to be noted that this right has been extended to the regulations, which should take into account the special circumstances of occupation. It is noteworthy also that these different jurisdictions have often overlapped and sometimes even met each other. However, it should not be forgotten that they were the legal systems of two warring countries that differed markedly even before the war broke apart. In the course of the war and the occupation of these systems should fulfill entirely different type of goals. Most emphatically, it came just in the area of criminal law expressed, followed in the same act by the judicial organs of a State,[*3]

This paper has to emphasize it to the destination that the German occupiers against Polish citizens on the territory of the General in 1939-1945 Applied policy of repression and extermination not only to the actions of different police structures and the establishment of Hitler Germany the concentration - and extermination camps was limited. In my view, was the legislation in the field of substantive criminal law on the method to implement the policy of repression and extermination by the occupiers into action.

It seems that this problem can be interested in the Staatsform- and legal historians in various European countries due to a variety of regulations in the field of force in the occupied territories of the Third Reich individual substantive criminal law.

Because of Hitler's decree of 12.10.1939 (entered into force on 26.10.) A dualistic legal form in the GG designed. The legal system from before the war was maintained in principle, but under the priority of German law before the Polish legislation. In this GG Polish legislation should apply that were not in contradiction to manage the acquisition by the

German Reich.[*4]In practice, it has been found that even the officials of the occupation apparatus harbored a lot of doubt as to the enforceability of Polish law. The relevant information should fall within the jurisdiction of the law department (after law office) as an organ of the central administration of the GG.[*5]

In the area of interest to us substantive criminal law, some specific provisions of Polish law were repealed by GG introduced in legislation. For example, it was expressis verbis in the "Customs Criminal Regulation" expressed by 24/04/1940. "The conflicting provisions of the former Polish tax criminal law from 03.11.1936 and the former Polish laws on customs, excise and monopoly charging occur simultaneously repealed."[*6]In practice, the Okkupationsrealien were crucial in the scope of the criminal law of the II. Republic of Poland. Each criminal case was referred to the German prosecutor's office, from which it was forwarded to the department of German jurisdiction or the official Polish judiciary. The occupiers held upright the limited system of Polish jurisdiction. Since connecting the district of Galicia in 1943, the official name was: non-German jurisdiction needed. Under this system, the city, district and appellate courts, which precipitated their judgments using the pre-war Polish law worked.[*7]

The normative acts of the central organs of the Third Reich

The dominant legal system in the GG was the German law. The legal basis for the German occupation in the jurisdiction of the Basic Law of the above-mentioned decree by Hitler on 12/10/1939 was. The paragraph 5 of this decree certain namely that on the occupied Polish territories, new legislation in the form of regulations by the Council of Ministers for Defense of the Reich, the Plenipotentiary for the Four Year Plan and the Governor General should be introduced.[*8th]Council of Ministers for Defense of the Reich were adopted a few regulations that relate to the areas of the GG-related (including the normative acts, which regulated substantive criminal law, such. As the pass criminal Regulation of 27 May 1942 RGBl I, pp 348- 350). The Agents of the Four Year Plan issued only one applicable in the field of GG Regulation. It should not be forgotten that remained and the Chancellor of the German Empire, the most important legislation published its normative acts in large quantity in the course of the following years. During the occupation, even those normative acts were enacted for GG, those of other central organs of the Third Reich as Interior Minister, Justice Minister, Labor Minister, Finance Minister, Defense Minister General Representative adopted for the administrative affairs of the Empire and General Manager for work. Due to a special power of Hitler one from the Reich Minister and Chief of the Reich Chancellery, chief of the Supreme Command of the Armed

Forces and head of the Party Chancellery ordinance was signed. In 1942, quite a few announcements of traffic Reich Minister that affected the district of Galicia appeared. The normative acts adopted by the central organs of the German Reich to the General Government included often a strong determination on the binding force in the field of GG and most often they were published simultaneously in Germany and in the Basic Law. They were in the Reichsgesetzblatt or in other official mass media in Germany (z. B. in the realm worksheet) and in the Official Gazette for the General Government published (including the normative acts, which regulated substantive criminal law, for. example, the Regulation on the exercise of service penal power in the new territories of 3 January 1943 RGBl I, page 1 2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. Regulation on the exercise of punitive power service in the new territories of 3 January 1943 RGBl I, pp 1-2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. Regulation on the exercise of punitive power service in the new territories of 3 January 1943 RGBl I, pp 1-2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. was controlled design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. was controlled design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law.[*9]

The normative acts of the organs of the General Government

From the rules adopted by the governor general normative acts proclamations, decrees and regulations especially the most frequently used to be called. The proclamations had a political-propagandistic

nature, the decrees related primarily to state system issues the regulations replaced laws and should establish the system of applicable law (the Governor General issued many regulations which included the provisions of substantive criminal law. I analyze it in following in this article). Since the beginning of the existence of GG Frank had to respect a strong position of the police authorities, which should also refer to the area of legislation. The package of legislation from the 10.26.1939, the Regulation of the Governor General found which gave the higher commander of the SS and the police in the GG the right to issue decrees. It was stressed that in matters of the SS and the police should get permission from Frank the fundamental concern of the higher commanders, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved.[* 10]The role of an official medium filled the "Official Gazette of the Governor General of the occupied Polish territories", which was issued in parallel since 10.31.1939 in the Basic Law and in the realm. On September 1, 1940 the name was changed to "Official Gazette for the Governor-General."

Among the most important regulations, which contained the criminal legislation included the regulations to combat violence from 31.10.1939, Regulation on the special courts of 15.10.1939, Regulation on the Polish jurisdiction of 19.02.1940, Regulation on the German jurisdiction from 19/02/1940 .[* 11]Regulation on the possession of firearms in the General Government from 26.11.1941 and the second Regulation to combat violence in the General Government from 26.11.1941, as well as the regulation on the control of attacks against the German construction

work from 02.10.1943.[* 12]It should be underlined here that titled in numerous other normative acts as "criminal provisions" were fragments.

The juxtaposition of the German and Polish jurisdiction

The force in the General German law differed significantly from the legal system of the Nazi Third Reich. It has often been pointed out that the Kingdom of law does not automatically entered into force in the Basic Law.[* 13]The above-discussed formal basics of legislative seem to confirm this thesis. yet it should not be forgotten that can be used by the authorities, and above all by the courts as a credible test the effectiveness of a legal system only the analysis of its practical application. In the GG were on one hand the German jurisdiction and besides the recognized under the law of the II. Republic of Poland Polish or non-German jurisdiction. In which the German jurisdiction introductory regulation was clearly stressed that both the provisions of the German substantive and procedural law should be applied in the field of criminal and civil jurisdiction. After the processing of the files of several dishes I've found[* 14]

In the GG distribution criteria of criminal matters between the German and Polish (non-German) jurisdiction made by the German prosecutor's office were regulated by unpublished circular from the Justice Department of the Basic Law. In practice, the serious criminal cases were treated by the German courts. Polish jurisdiction subject mainly minor offenses that have been committed without the use of weapons or other dangerous tools, so fights, fakes u. like.[* 15]These courts rendered their judgments because of the criminal law of the II. Republic of Poland (especially the Penal Code of 1932).

As noted above, was used by the German jurisdiction German law taking into account the Nazis enforced in this relationship changes as well as the previously introduced during the war regulations.[* 16]In the field of the Basic Law, however, the Decree of 12.4.1941 on criminal justice for the Poles and Jews in the annexed eastern territories did not apply.[* 17]

The intensification of criminal law in the GG

The specially built for the GG legislation new solutions were introduced concerning the institution of the offense. Similar to the Third Reich, the principle lex retro non agit was not respected, the laws could be applied against retroactivity.

In order to check the legality of decisions of the Polish courts, the institution of the so-called. Verification law was introduced. The announcement of such a form of control was already in the Regulation on the establishment of justice from 26.10.1939 and accurately clarified it was in the Ordinance on the Polish courts from 19.02.1940. The appeal of a judgment was requested by the head of the Justice Department in the

given district in the German High Court within 6 months from its legal force. As a prerequisite was a violation of the public interest. The German high court could approve the decision or cancel it. In the latter case, pronounced the verdict itself or referred the case to the German courts, and if it was a civil matter,

Characteristic of the criminal situation in the GG was the fact that the review law came into force retroactively. All decisions of the Polish courts, which entered into force after 31 July 1938, could be reviewed. From this for Poland anyway unfavorable principle a broad exception has been made yet. In particularly relevant cases if the decision violated the interests of the German nation, the decision could be reviewed without any consideration of the time that had elapsed since the date of its legal effect. The decision on the review of the decision could be taken by GG in such a situation by the head of the justice department.[* 18]

A fundamental normative act in the field of substantive criminal law was the regulation on the control of violence from 31.10.1939. At the beginning of the existence of the Basic Law, a catalog was separated from matters that were of interest for the safety of the occupier most essential. Among them were counted:

- acts of violence against the rich and against the German authorities in the GG;
- willful damage done to institutions of the German authorities and their labor organizations or institutions of public utility;
- Call or encouragement to disobey regulations or orders of the German authorities;
- acts of violence against the Germans because they belong to the German nation;
- arson of property of the Germans ".

The responsibility also helped the assistants and instigator. Punishable was the attempt of these actions, the concept of an experiment designed far. "Those who conspired to commit a crime, whoever comes to this, with others to an agreement who is offering the commission of a crime or accepting such an offer." The offense also referred to people who had learned of the commission intent of the criminal offenses and of which the authorities or the person at risk have not been informed.[* 19]

The regulation on gun ownership from 09/12/1939, so even from before the foundation of the Basic Law should apply to persons with weapons, ammunition, hand grenades, explosives or other war equipment possessed. The provisions of that Regulation have been maintained in the Basic Law also expanded accordingly and "who gets a

message about an illegal gun ownership by another person and notifying the authorities can also be subject to a penalty."[* 20]

During the occupation, the transfer of solutions in the field of substantive criminal law of the Third Reich could have happened to the Basic Law. The easiest way were the regulations of Hitler, which entered into force in both the Empire and in GG (they were also published in the Official Gazette of the Government General).[* 21]Another type was the law of the Governor General, which took into account the changes in the law in Germany. This refers, for example, to the introduction of III from. Empire known construction "of a habit offender". The "as strict or as much condemned by criminals that they should be regarded as a constant danger to the community", were from the Polish (non-German) jurisdiction "held to ensure" or even condemned by the German special courts to death are, if it was made out of consideration for "the protection of the general public or the need for a just retribution." In the realities of the Basic Law, it meant the chance to break the fundamental principles of legality,[* 22]

Similar to the German Reich the generalization of criminal responsibility for any violations of the applicable provisions in the Basic Law was introduced towards the end of the war. Punishable under Regulation from 10.02.1943 the violation of laws, regulations, orders and decrees of the authorities was too difficult with the intention of "the German integration in the General Government" or hinder it. This also was true for the trial; responsibility also wore the assistants and instigator.[* 23]

In the General even a few hundred normative acts were (they made leges speziales in relation to the Polish and German criminal code is) adopted in which the actions of criminal deeds were told that remain under normal circumstances beyond the scope of criminal law. A wide expanded penalization concerned such areas as cultural activities, work and club activity.[* 24]

The definitions of the issues were often controlled according to a constant pattern. A standard formula was worded as follows: "Whoever undertakes to act contrary to its provisions shall be punished".[* 25]

In addition, there was a convenient solution that was that things were expelled from the criminal administrative proceedings in the criminal case. The most frequent general clause was used: "a) Failure to comply with this regulation will be punished in the criminal administrative proceedings; German prosecutors used) ": b) if the punishment does not seem to be sufficient under this procedure should be left to the cause of German plaintive Authority (since 1943 the name was.[* 26]

The differentiation among the groups of people

A characteristic feature of substantive criminal law in the Basic Law, the difference that annexed by another of the Third Reich territories, was not only to maintain the privileged status of the Germans, but also the differentiation of the legal status of Poles and Jews. Was expressed it in the already adopted in 1939 normative acts. The rules established for the Jews contained more far-reaching and don'ts and saw significantly tougher sanctions for their injuries. As an example the rules on the introduction of the obligation to work for the Polish population of the GG can serve. For the Jews a special regulation on the introduction of compulsory labor was adopted on the same day that still contained stricter regulations.[* 27]In the legislative way the Jews of personal liberty, property, freedom of choice of employment, the right to education, the freedom of choice of residence, freedom of movement, were robbed in the overseas trip. It has even introduced the ban to leave the residence.[* 28]Since mid-1941, the number of legislative acts adopted exclusively for the Jewish population is drastically reduced. Maybe it is due to the increasing competencies of Himmler in relation to the planned extermination of the Jews.[* 29]

Polish law in the General

upright obtained from the occupiers learned Polish law in terms of the system of no changes in the penal code of 1932 resulting penalties. The occupiers, however, have limited the verdict freedom of Polish judges. There have been limited to date skills of Polish courts because they were considered by the occupation authorities of the GG Justice Department as permissions from the character of the grace of law. The authorities of the justice department have declared that the Polish courts no longer have the right, on the sentencing to probation or parole to recognize because they were to be regarded as acts of grace. The extraordinary mitigation of punishment, however, was treated differently because she was regarded as an institution, which refers on punishment and not to the grace of law. In which in some cases are entitled to the court right to withdraw from the penalty imposed despite the Guilty speaking, the occupiers have the right to decide reserved.[* 30]

The sanctions system

The changes made in the Third Reich within the penal system were naturally respected the judicial system of the Basic Law. In the imported GG criminal provisions of the following catalog of the fines was utilized: death, severe prison, jail, fine, fine asset seizure (they could be separated or imposed as an additional penalty). The additional penalties following penalties were counted: permanent or temporarily limited prohibition (it concerned the doctors), forced labor in the forest. It also was a chance to condemn the Bußzahlung in favor of the victim.

It should be emphasized that the authorities of the Third Reich had also considered the concept of order are kept on the territory of the Basic Law only with the help of police coercion. For the local population this would have meant the absolute deprivation of any legal system. Primarily for economic reasons, this concept was rejected. The Basic Law should be the object of exploitation by the Government and in connection therewith, relying on police action was recognized as inadmissible because they had made a normal functioning of the economic life impossible.[*31]Gained the upper hand of the view that the establishment of a dualistic legal system is practical, which should, however, administer justice due to the drastically strict criminal laws. Matters referred to above and in the fundamental regulation to combat violence from 31/10/1939 (§ 1-9) were threatened with mandatory death penalty.[*32]The scope of a draconian penalization in the GG testifies to the fact that this punishment (mandatory or optional) was provided in nearly 30 published in the Official Gazette of the Government General normative acts. These rules issues were regulated, which were not threatened even in the realm of the highest penalties.[*33]The most important concern the aforementioned Regulation to combat attacks against the German integration in the General Government from 02.10.1943, was that extended criminal liability for any violations of the applicable provisions in the General Government and threatened with the death penalty was. The most spectacular example concerns the condemnation of the Jews to death if they are not relocated to ghettos or left their limitations. Plus, all death penalty were threatened that gave them refuge, especially when they brought the Jews out of the ghetto borders, they fed or hidden.[*34]

None of the occupied countries, the Germans have introduced so repressive regulations. The economic interests of the occupier served here as the foundation of penalization any resistance to the entry of agricultural products from the GG authorities (and particularly the sabotage of compulsory agricultural quotas). The threat of the death penalty regulations were in GG triple (1942, 1943, 1944), giving the criminal facts were significantly expanded in relation to the pattern of 1942 in the coming years. the duration of the state of emergency for the entry of agricultural products was also extended. In 1942, this was for the period from 1:08. to 30.11. certainly; for the years 1943 and 1944 however, for those from 15:07 to 20:12.).[*35]As part of a maximum material exploitation of the population, the very common threat to be (as in more than 60 normative acts) called with the unlimited fine height and different seizure types (in more than 30 normative acts).[*36]

It should be noted that Himmler next to the system of criminal law and the judicial system in the Basic Law nor had the direct child

concentration and extermination camps available. The deportation to the camps did not belong to the catalog of penalties provided in criminal law, but from the perspective of the prisoners could be regarded as one of the most sensitive sanctions.[*37]

The criminal law of the Polish Underground State

were in the area of the General Government and were the rules of criminal law for the application in time of functioning of the Polish Underground State (Polish: Polskie Państwo Podziemne) were introduced. It should be emphasized that the formation and activities of the Polish Underground State during the II. World War, in my opinion, an absolutely unique phenomenon in the European realities of years was 1939-1945. None of the other countries it was possible to make such an all-encompassing and secret state apparatus).[*38]The conspiracy courts of the Polish Underground State (both military as well as ordinary courts) recognized under the rules in force in the Republic of Poland before the outbreak of the II. World War substantive criminal law. However, if they were applying new regulations, which were introduced by the institutions of the Polish State in 1939-1945 in response to the extraordinary war and Okkupationsrealien. Out of consideration for the fact that the Polish Underground State functioned not only in the field of the Basic Law, but also to all annexed by the Third Reich Polish territories and to the east of the GG-limits lying territories, this problem should be presented in a separate processing.[*39]

Remarks:

[*1]W. Witkowski, the administrative history in Poland 1764-1989, Warsaw 2007, p 384; Ł. Kozera, M. Wojtasik, Administrative Overview of the German occupation of the General Government (comment and source texts), Chełm 2008, p 4, 9-11; D. Schenk, Hans Frank, Biography of the Governor General, Krakow 2009, pp 147, 151; K. Grünberg, B. Otręba, Hans Frank in the Wawel Castle, Włocławek 2001, pp 43-45, 47-50; M. Winstone, General. A dark heart of Europe under Hitler, Poznan 2015, pp 70-71.

[*2]Among the most important documents, which regulated the questions of the form of government in addition to the propaganda proclamation of Hans Frank, were: the first regulation on the administrative reconstruction of the occupied Polish territories, the Regulation on the safety and order in the General Government. The ordinances of the occupied Polish territories, pp 1-5 (the first four numbers are printed in Warsaw, the next already appeared in Krakow). A. Wrzyszcz, the German occupation of jurisdiction in the General

Government 1939-1945. Organization and functioning, Lublin 2008, pp 358th

[*3] A. Wrzyszcz, the substantive law on the Polish territories during World War 2 [in:] System Prawa Karnego (criminal justice system), Volume 2, Źródła prawa karnego (criminal sources). Edited by T. Bojarski, Warsaw 2011, pp 161-162. Fragments of this publication are evaluated below in this article.

[*4] A. Alas, the right of the General Government in a businesslike arrangement with explanations and detailed list (third edition), Krakow 1941, A 100, the adoption of the leader and Chancellor of the German Reich on the administration of the occupied Polish territories from 12.10.1939 (hereinafter: A 100), §. 4

[*5] A. Wrzyszcz, the German occupation of jurisdiction ..., p 344, 354-357.

[*6] A. Alas, the right of the General ..., G 390. The regulation on criminal law and criminal procedure of Supply brauchssteuer-, customs and monopoly infringements (Customs Criminal Ordinance) of 04.24.1940, § 33, Para. 3.

[*7] A. Wrzyszcz, for the organization of the Polish occupation jurisdiction in the General Government in 1939-1945, Zeszyty Majdanka (Majdanek issues), Vol. XIV, 1992, pp 114-117. See also the memoirs of Judge Remigiusz Moszynski from the time of the German occupation in Poland in 1939-1945, Diary 1939-1945. The war and occupation in Lublin in the eyes of adults and children, editing and foreword by the priest E. Walawander, Scientific Society of KUL, Lublin, 2014.

[*8th] A. Alas, the right of the General ..., A 100, § 5; Reichsgesetzblatt 1939 I, pp 2077-2078; FW Adami, the legislative work in the General Government. A review of the hitherto development work - "German law" 1940, p 604th

[*9] A. Wrzyszcz, the German occupation of jurisdiction ..., p 346-349.

[*10] Ibid 350th

[*11] A. Alas, the right of the General ..., C 105, The Regulation on the special courts in the General Government from 15.11.1939, C 120, The regulation on the German jurisdiction in the General Government from 19.02.1940, C 150, The regulation on the Polish jurisdiction in the General from 02/19/1940, (hereinafter referred to C 150); C 305 Regulation to combat violence in the General Government from 31.10.1939 (hereinafter C 305).

[*12] The ordinances of the General Government (hereinafter VbGG), 1941, pp 662-663, pp 663-664, 1943, pp 589-590.

[*13] KM Pospieszalski, The National Socialist "occupation law" in Poland, Part II, General, selection of documents and attempted synthesis, Poznan 1958; P. 37

[*14] A. Wrzyszcz, the German occupation of jurisdiction ..., p 382, respectively.

[*15] J. Mazurkiewicz, L. Policha, The history of Lublin jurisdiction in the years 1915-1944, typescript at the Institute of Constitutional and Legal History at the UMCS Lublin, pp 46-49; J. Szarycz, judges and courts in Poland in the years 1918-1988, Ministry of Justice, Department of Investigation of court law, Warsaw 1988, pp 33-37; Z. Mańkowski, between the Vistula and the Bug, study on the policy of the occupier and attitudes of society, Lublin 1982, pp 139-140; A. Wrzyszcz, the German occupation of jurisdiction ..., S. 106th

[*16] For example, the Regulation on the public tortfeasor from 09.05.1939; the Regulation on emergency measures in the field of broadcasting from 01.09.1939; the Regulation on the war economy from 09/04/1939 others; A. Wrzyszcz, the German occupation of jurisdiction ..., p 376-378.

[*17] Cz. . Madajczyk, The Politics of the Third Reich in occupied Poland, Volume II, Warsaw 1970, p 245-254; D. Majer, "foreign peoples" in the Third Reich. Contribution to Nazi legislation and legal practice in the administration and justice with special reference to incorporated into the Reich and the General Government Areas, Warsaw 1989, p 328; A. Wrzyszcz, the German occupation of jurisdiction ..., p 384-386.

[*18] A. Alas, the right of the General ..., C 100, The Regulation on the establishment of justice in the General Government from 26.10.1939; §§ 3; C 150, 16-18; G. Moritz, The jurisdiction in occupied territories. Historical development and international legal assessment, Tübingen 1959: 79th

[*19] A. Alas, the right of the General ..., C 305, § 1-9.

[*20] Ibid, § 10; C 300, Regulation of the commander of the army over possession of arms of 12 September 1939 § 2-3. The rules on gun ownership were at 26/11/1941 nachpräzisiert (including the responsibility of the Germans and the other GG-residents was differentiated into consideration the institution of remorse active). VbGG, pp 662-663.

[*21] Regulation to protect the collection of winter clothing for the front from 12.23.1941, VbGG 1942, p.9; Regulation of the leader to protect the arms industry from 03/21/1942, VbGG, S. 250. The enclosed therein facts led the offense to against the collection of winter clothing for the front-directed actions and the threat to interests of the armaments industry of the kingdom one. W. Wolter, The imposed criminal law in the field of so-called General Government by Nazi attackers [in:]. Expertise and decisions to the Supreme People's Court, selected and

prepared for publication by Cz. Pilichowski, Vol. II, Warsaw 1979, p 335, 339-340.

[* 22] The regulation on the protection against heavy and habitual criminals from 20.03.1942, VbGG, p 143; W. Wolter, The imposed criminal law ..., p 286-287.

[* 23] This responsibility, however, the citizens of the III with the bore the Germans. Empire not allied and neutral countries. Compared with the Third Reich and the citizens of the above countries, the criminal responsibility of Poland was aggravated. Regulation to combat attacks against the German integration in the General Government from 10.02.1943, VbGG, pp 589-590.

[* 24] W. Wolter, The imposed criminal law ..., p 301-306.

[* 25] For example, the Regulation on the seizure of equipment and structures of the petroleum industry from 23/01/1940, VbGG, p 21; The Regulation on the seizure of private assets from 01.24.1940, VbGG, p 23 and many others.

[* 26] W. Wolter, The imposed criminal law ..., p 271st

[* 27] A. Wrzyszcz, the German occupation of jurisdiction ..., p 365-367.

[* 28] W. Uruszczak, the legal legacy of the 20th century with the eyes of a historian. The foreign, own, virtuous and vicious right {in:] The right legacy of the 20th century. The memorial book to mark the 150th anniversary of the Society of Law students of the Jagiellonian University, Editorial Committee: A. inches, J. Stelmach, J. Halberda, Kantor Wydawniczy (publisher) Zakamycze 2001, p 92nd

[* 29] In the years 1941-1942 the Police Regulations of the SS and Police Commander in Chief Kruger, who was placed under Himmler were of paramount importance. They regulated the formation of Jewish neighborhoods in towns mentioned in all five districts of the Basic Law. Police Regulation on the formation of Jewish residential districts in the districts of Warsaw and Lublin on 28/10/1942, VbGG, pp 665-666 and the Regulation on the formation of Jewish residential districts in the districts of Radom, Krakow and Galicia from 10.11.1942, VbGG, S. 683-686.

[* 30] A. Alas, the right of the General ..., C 150, § 3; A. Wrzyszcz, the German occupation of jurisdiction ..., p 207-208.

[* 31] D. Majer, "foreign peoples" ..., p 318-319.

[* 32] A. Alas, the right of the General ..., C 305, § 1-9.

[* 33] In the General violation of the following regulations was threatened with the highest penalty: Regulations on the fight against sexually transmitted diseases from 22/02/1940, A. Alas, the right of the General ..., B 520; Regulations for the protection of the forest and wild from 04.13.1940; A. Alas, the right of the General ..., B 670; Regulations on the mandatory reporting of Polish officers from 07.31.1940; A. Alas, the

right of the General ..., A 316; Regulations on fire protection from 22.04.1941, VbGG, p 227; Regulations against the abuse of uniforms from 09.05.1941, VbGG, p 278; Regulations on air protection from 22.04.1941, VbGG, p 341; Assemblies on the introduction of darkening of 26.06.1941, VbGG, p 394; Regulations on gun ownership from 11.26.1941, VbGG, p 662; Regulations of the leader to protect the collection of winter clothing for the front from 23.12.1941, VbGG 1942, p.9; Regulations for protection against heavy and habitual criminals from 03.20.1942, VbGG 1942, p 143; Regulations on working with living pathogens from 01.13.1944, VbGG, p 26; Police regulations on the use of cars and motorcycles in the city of Warsaw on 02.02.1944, VbGG, p 45; Regulations on drug trafficking from 01.13.1944, VbGG, p 72; Regulations on the explosives from 05.31.1944, VbGG, p 194; Regulations on the Protection of the fasteners from 09.03.1944, VbGG, p 245, among others Regulations on working with living pathogens from 01.13.1944, VbGG, p 26; Police regulations on the use of cars and motorcycles in the city of Warsaw on 02.02.1944, VbGG, p 45; Regulations on drug trafficking from 01.13.1944, VbGG, p 72; Regulations on the explosives from 05.31.1944, VbGG, p 194; Regulations on the Protection of the fasteners from 09.03.1944, VbGG, p 245, among others Regulations on working with living pathogens from 01.13.1944, VbGG, p 26; Police regulations on the use of cars and motorcycles in the city of Warsaw on 02.02.1944, VbGG, p 45; Regulations on drug trafficking from 01.13.1944, VbGG, p 72; Regulations on the explosives from 05.31.1944, VbGG, p 194; Regulations on the Protection of the fasteners from 09.03.1944, VbGG, p 245, among others

[* 34] Police Regulation on the formation of Jewish residential districts in the districts of Warsaw and Lublin on 28/10/1942, VbGG, pp 665-66, § 2-3 and the Police Regulation on the formation of Jewish residential districts in the districts of Radom, Krakow and Galicia from 11/10/1942 , VbGG, pp 683-686, § 2-3.

[* 35] Regulation to protect the crop from the acquisition 11.07.1942, VbGG, S. 409, § 1, 2; The regulation for the protection of the crop gathering and food security in the year 1943/1944 from 14.7.1943, VbGG, p 320, § 1, 2; Regulation to protect the crop collection and to food security in the financial year 1944/1945 from 13.07.1944, VbGG, S. 208, § 1, second

[* 36] A. Wrzyszcz, Substantive Criminal Law ..., S. 182nd

Republic of Poland. Polish society and the Underground State 1939-1945, Warsaw 2000; G. Górski, The Polish Underground State 1939-1945, Thorn 1998 and very many other operations.

[* 39] A. Wrzyszcz, Substantive Criminal Law ..., pp 168-170, 177-178, 184th

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Self-Determination of Peoples: the concept and direction

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Abstract

The article is devoted to the development of the law to self-determination, international and domestic legal basis of its establishment. Its history and modern trends are distinguished in approach to the concept of self-determination. Interaction to the law of self-determination with other principles of international law is investigated. Implementation criteria of this law are differentiated. The implementation of its directions is given areas to the local self-government body and proposals and recommendations for legislation are given in this area. It is concluded that, self-determination as a right has a basis as international law, applies to nations living under colonial dependence, self-determination for minorities is related to the type of the political regime and the right for self-determination has a collective legal content which is guarantee for individual rights. Keywords: self-determination, international law, international instruments, national legislation, political decisions, UN, Council of Europe, OSCE, ethnic minorities, regions, national interests, ethnic groups, ethnic minorities, sovereignty, human rights, indigenous peoples

Self-determination, which is more purposeful way of people's being organized, emerges as a result of nation's will for government. First adopted laws also linked the self-determination concept with the people's will. For example, the first French Constitution as of 1791 says that the goal of every state is "to ensure natural and integral rights of people" and "the source of sovereignty is the people's will". Recent increase in the number of "non-recognized" entities has increased the number of claims for the law of self-determination in the field of international law. "Self-determination of destiny" or "self-determination" concepts have emerged as a result of freedom fights by different groups. The law of self-determination, which reflects freedom fights of different peoples, has been gradually incorporated into national legislations and international contracts.

US Declaration of Independence develops this idea even further by embracing this idea legally. Self-determination (for colonial emancipation) establishes international and (democratic government) domestic directions. As an example to democratic government, at the end of I World War, on May of 1916, the US President V. Vilson has specifically emphasized the right of peoples to elect political government based on the provisions of Constitution. Therefore, two ideas are suggested: "domestic self-determination" or "non-political self-determination". According to "self-determination" principle, any nation is free to select the desired form of sovereignty. Self-determination in USA has emerged as a result of anti-British governance and later the US Declaration of Independence refers to the self-determination as a right granted by God as a democratic way of government.

Self-determination right has evolved historically. Since 90s of XVIII century, peoples' sovereignty idea has been interpreted as a right of people, inhabiting certain territories, to decide under which state government they want to live. The right of self-determination shall be understood within the framework of national and political context. The idea of significance of uniting the territories that share the same language under the same country and using linguistics to determine the state borders, has started to expand, and national freedom fight has been combined with national sovereignty and peoples' right for self-determination.

"Self-determination" term was used for the first time in Berlin Congress in 1878. In general, XX century and its middle years are referred to as period of self-determination and colonial emancipation. There were only few colonies (except for Russia and Iran) left at the beginning of XXI century. Therefore it is important to look at appropriate right within the transformative aspect. In other words,

secession defines not the context, but rather the direction of democratic government.

Self-determination is interesting in terms of history. Self-determination idea is translated into the principles in the United Nations (UN) documents. UN documents provide a new content and conditions to the self-determination. UN Charter and Resolution dated December 14, 1960 by General Assembly 1514 (XV) treats the self-determination as a tool for colonial emancipation. Moreover it defines the criteria to prevent cases of abuse of this right.

When drafting the UN Charter, the I Commission of San-Francisco Conference of 1945, analyzes the importance of "equality of rights of nations" and "self-determination" principles reflected in Item 2, Article I and comes to the conclusion that these Articles fall under the same Norm, which is the manifestation of free and complete will of people. In order to develop the Charter, UN includes the self-determination principles to other documents. Every UN member country shall respect this right and support it, in accordance with the UN Charter. The Article 2 of Resolution number 1514, dated December 14, 1969, says that every nation has a right for self-determination and this right enables them to determine their political status and pursue their economic, social and cultural development.

In order to legitimatize this idea (principle), UN General Assembly has adopted the Resolution number 1803 (XVII), dated 14 December 1962 on ""Permanent sovereignty over natural resources"" and the Resolution number 2105 (XX), dated 20 December 1965 on "Implementation of the Declaration on granting of Independence to Colonial Countries and Peoples"

Since self-determination is the process of transition to independent political will and establishment of sovereign state, this principle brings up the issue of minority nations. The main problem was the classification of the minority nations. Since, any group can be referred to as a nation during experience. Minority group cannot succeed either because of the failure to realize its independence or lack of grounds to become "independent". The group that demands this right, most probably, shall achieve it. They have to go through the historical development process in order to achieve the self-determination rights. In international law, it looks like a problem of recognition occurred after establishment of the state.

Issues to self-determination, in international law, are associated firstly with the thinkers like H. Grtosiy, de Vattel, J.J. Russo. Even though a long time has passed since then, there is no unanimous position on this issue. There is certain difference in the thoughts of philosophers, political scientists and lawyers about the right for self-determination, the

subject of this right, its basics and legal nature. It worth mentioning that uncertainty of concept, contradiction of collected experience, administrative and political approaches cause differences in opinion.

Differences of opinions among philosophers and political scientists create different ideas about self-determination among international lawyers. One group of scientists (for example, B. Tuzmuhamedov, H. Gros, G.Espiell[1] etc) think that, self-determination is an imperative (jus cogens) norm of international law, others (for example, J.Crawford[2], A.Cassese[3], R.Emerson[4], M.Şou[5]etc) claim that, self-determination can be recognized by following certain conditions and other legal standards.

Another common idea is that the self-determination has negative aspects in international arena, and is related to political and ethical principles including separatism trends. Existence of such position is related to the uncertainty of scope of the relevant law. Many lawyers (R.Emerson[6], A.İdovn[7], J.Verzili, N.Glazer, C.Elden[8], A.Etzioni, B.Hendrix[9]) suggest that, the scope and framework of this right (principle) is uncertain. Especially, in the case of separatism and ethnic conflicts (for example, Armenian community in the Republic of Azerbaijan, Russian minority in Moldova – course author), claiming this principle groundlessly and granting self-determination right to minorities have resulted in negative thoughts about this right, because of breakup of territories. UN expert on minorities A. Eyde notes that international documents call for self-determination idea in uncertain way. Therefore, it is misinterpreted with regard to uncertainty of self-determination and security of the countries.

When self-determination is manifested in the foreign form, it creates new and uncertain problems for international security. In this sense, any group who wants to use self-determination principle, shall

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[1] Espiel G. The Right to Self-Determination. Implementation of United Nations Resolutions. See, UN Doc. E/CN.4/Sup.2/405/Rev.1/1980/, para.90

[2] Crawford J. The Creation of States in International Law. Oxford. apud Mclellan T.G. in Kosovo, Abkhazia and the Consequences of state recognition. C.S.L.R. 2009. Volume 5. Cambridge. p.56

[3] Cassese A. Self-determination of people: A legal reappraisal. Cambridge University Press, 1999, p.69

[4] Emerson R. Self-Determination. American Journal of International Law. 65/3:464, 1971, p.224

[5] Shaw M. "Re: Order in Council P.C. 1996-1997 of 30 Septemper 1996", in Self-Determination in International Law: Quebec and Lessons Learned, Anne Bayefsky (ed.), 2000, p.136

[6] Emerson R. Self-Determination. American Journal of International Law. 65/3:464 in 2004, p.224-238

[7] Idowu A.A. Revisiting the Right to Self-Determination in Modern International Law: Implications for African States European Journal of Social Sciences. Volume 6, Number 4, 2008

[8] Elden S. Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders. SAIS Reviev. XXVI (1). p.11-24

[9] Hendrix B.A. International law as a moral theory of state territory? Geopolitics. 2001. 6(2) p.141-162

respect sovereignty of the country. Resolution number 2625 of the UN General Assembly states that, sovereignty of the state prevails over breakup and separation of nation or country.

International law ties self-determination right and equality of nations' rights. In this regard, when self-determination is realized, the rights of other nations, peoples and groups shall be respected. Vienne Declaration about Human Rights as of 25 June, 1993 and Action Program recognized the right for self-determination and after declaring that UN Resolution is rightful, mention that it shall not be interpreted as an action aimed at violation of territorial integrity10. 1970 Declaration of Principle suggests that nothing in the Declaration shall be construed as allowing or sanctioning breakup and partial or complete violation of the territorial integrity and political unity of the government, which represents the whole nation and does not discriminate because of ethnicity, color of skin and religion, as well as respects the right for self-determination and equality of rights.

Article 6 of the Resolution 1514 describes this issue more seriously. The Article says, any effort aimed at violation of national unity or territorial integrity of the country contradicts to the objectives and principles of the United Nations Charter. Territorial integrity is included to the name "self-determination". If you pay attention, the name of the principle starts with the "Equality of rights of nations". Preamble of the Vienne Convention as of 1969 on the Law of Treaties says that member states agree on the followings taking into consideration equality of the rights in international law and self-determination, sovereign equality and independence of all sates, not interference in domestic affairs of the state, forced threat or prevention of its realization, and respecting human rights and main freedoms included in UN Charter.

In spite of all this, most international lawyers recognize self-determination rights of the nations, this right can be realized only by nations living under colonial dependence or occupation11.

A. Eide, the director of the Norwegian Human Rights Institute, member of the UN sub-committee on protection of minorities and prevention of discrimination, says that self-determination has been adopted firstly in terms of colonial occupation12. Then A. Eide mentions

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[10] Rousseau Ch. La succession d'Etats et le droit internationale public. P.: Pedone, 1991. (476 p.), p.225

[11] Castellino J. International law and Self-determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity. The Hague: Martinus Nijhoff Publishers, 2000

[12] Возможные пути и средства мирного и конструктивного решения проблем, связанных с меньшинствами // Второй доклад о проделанной работе, представленный г-ном Асбьерном Эйде., Док ООН E/CN.4/Sib.2/1992/37 // Цитируется по Черниченко С.В. Принцип

that the right for self-determination can apply to the nations who live in occupied territories, after ratification of the UN Charter.

Certain level of exploitation shall exist in order to realize this right. Freedom movement of the group in this approach is determined not by internal qualities of the group, but rather by vagarious human rights of the aggressors.

The right for self-determination historically has applied to the people who were in the process of transformation to a nation under colonial dependence, presently is used as a guarantee system of human rights in democratic government form.

Taking into consideration democratic administration experience of European countries, Antonio Cassese comes to the certain conclusions with regard to self-determination and suggests that application of this right shall be limited to address the current problems in Europe and other regions13.

D. Cameron mentions that newly created national states presently lose their trust in self-determination rights. Since, this principle creates secession problem, break-up threats to the states, therefore self-determination is a direct threat to sovereignty, territorial integrity and population of the states14. Secession is considered legal in those situations, when the state makes self-determination impossible by not creating democratic government, practicing systematic discrimination, thus massively violating human rights and not leaving any other chance for changing current situation.

Keeping in mind above-mentioned practice, a new form of realization of this right in international documents is interpreted together with efficient protection of human rights. Final document adopted by the OSCE in Paris on November 21, 1990 describes the right for self-determination in accordance with the UN Charter and its principles, including territorial integrity principle15. During implementation of the right for self-determination included in final document, this right has been identified with breakup right, therefore self-determination shall be adopted together with territorial integrity.

самоопределения народов (современная интерпретация) // Московский журнал международного права.1996, № 4, (с. 3-21) с.15

[13] Cassese A. Self-determination of people: A legal reappraisal. Cambridge University Press, 1999, p. 115

[14] Cameron David. Globalization And Self-Determination: Is The Nation-State Under Siege? (Rout ledge Studies in; 4 edition (May 26, 2006). Rout ledge the Modern World Economy), (353 p.) p.119-120

[15] Парижская хартия для новой Европы // 21 ноября 1990 // Mode of access: <http://www.osce.org/documents/mcs/1990/11/4045_ru.pdf>.

Modern international law does not recognize break-up "right" justifying foreign aspect of self-determination. It rightfully mentions that, self-determination right of the nations has been incorporated in many international legal documents, but break-up right is not even recognized as a right. It requires determining clear distinction between break-up and self-determination of nations16.

International law doctrine says that, break-up self-determination shall be based on reasonability, rather than on coercion. There are over 3000 nations and ethnic group in the world17. In such situation, it is very scary even to think about the consequences of recognition of the break-up right to international peace and security18.

During realization of self-determination right, current international law requirements shall be observed; rights of other nations shall be respected. I. Brounline suggests that, violation of well-known norms of international laws, i.e. jus cogens norms, makes it impossible for international community to recognize self-determination right of the nations after its implementation. I. Brounline describes this idea by "jus ex injuria non oritur" principle and underlines that, no right can be implemented by violating other right19.

UN General Secretary notes in his "Peace Program" that "claims by every ethnic, religious and other groups for establishment of independent state is impossible with respect to ensuring peace and security and economic development".

The demand for break-up by ethnic group and national minorities may disrupt domestic welfare of the state and cause conflicts among ethnic communities, therefore self-determination is not accepted as it is described. Keeping in mind complexity of this problem, the Report by Human and Peoples' Rights Center under Paduan University submitted to the second Helsinki Civil Assembly in Bratislava in 1992, calls for determination of directions of self-determination, including domestic and foreign directions of this right.

International documents do not determine clearly foreign and domestic directions of this right, but identify boundaries of self-determination. According to UN Charter, 1970 Declaration on

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[16] Решетов Ю.А. Право на самоопределение и отделение // Московский журнал международного права. 1994, № 1. (с. 3-20), с.3

[17] James Minahan "Encyclopedia of the Stateless Nations Ethnic and National Groups around the World" // цитируется в «Право на независимость. Юридический ликбез» // Режим доступа: <http://www.washprofile.org/?q=ru/node/7415>. Дата доступа: 02.02.2010.

[18] Морозов Ю., Лутовинов В. Этносепаратизм как угроза национальной, региональной и глобальной безопасности // <http://www.voskres.ru/army/publicist/chuma.htm>.

[19] Броунли Я. Международное право. В 2-х книгах. Кн. 1. Под ред.: Тункин, Г.И. Пер.: Андрианов С.Н // М.: Прогресс, 1977, - (535 с.), с.137; Brownlie I., Principles of Public International law. 5th edition. Oxford 1998

international law principles of friendly relationship and cooperation, says that self-determination is:

creation of sovereign or independent state,

free amalgamation of one state with other independent state, or

government method or form chosen by the people by selecting freely political status.

It is noted that, the right for self-determination applies to colonies and the territory of the colony or other none self-governed territory has a different status than the territory of the state governing it according to the Charter. As the Charter suggests, this territory with different status remains until the nations of the colony or none self-governed territory implements the right for self-determination in accordance with the Charter, especially its objectives and principles.

Indirectly foreign and political forms of self-determination and internal aspect within the existing state come to mind. Hence, foreign right for self-determination can be exercised by the nations living in colonial dependence, i.e. by a group of people of independent country, who cannot participate equally together with other people in self-determination and state management. UN experience recalls domestic self-determination as colonial emancipation. However, 1975 Helsinki Final document applies this right to whole nation and interprets domestic self-determination not only within the colonial dependence, but also within the respect to human rights context. Helsinki Final document draws a special attention to the territorial integrity principle during foreign self-determination. Further document of the OSCE prohibits mutual recognition of borders of the state and changing the borders by using force. According to the foreign self-determination aspect in international law, nations have only a free right to determine their political status. Domestic aspect of self-determination is carried out within the boundaries of the state, and stipulates only cultural, administrative and territorial autonomy20.

Self-determination can be manifested in different directions. These directions of self-determination include: political, economic, social, cultural (humanitarian). Except for political and economic self-determination, in all other cases, self-determination appears in domestic aspect. In this case secession problem does not occur.

[20] Hannum H., Richard B. Lillich. The Concept of Autonomy in International Law, Volume 4, No.74, October, 1980

During political self-determination, establishment of independent state means expression of the nation's will by creating independent country21.

Economic self-determination is expressing the will to realize free, sovereign economic activities over the natural resources and ensure equal rights in economic field and mutually beneficial cooperation22.

In social contexts self-determination means expression of the will to self-improve life conditions by the nation and rebuild the society in social aspect23.

Cultural self-determination implies the norms of expressing the will in different forms of culture, religion, science, and public life within the territory of the country, depending on historic, economic and social conditions24.

We think that the above mentioned basis of self-determination shall be implemented in certain priority. This time, political self-determination shall be at the end when other legal means are not sufficient and this right shall cover only the nation historically inhabiting the territory. In modern period, the international relations opt for domestic or cultural self-determination, i.e. establishment democratic institutions and group representation mechanism, which allow efficient participation of all members of the society and all the groups in management of the resources and distribution, rather than political self-determination. Colonial emancipation, which was primary goal of self-determination, requires reforming the meaning of self-determination. Therefore, international law scientists have started to search for other possible forms of implementation of this right25.

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[21] Hannum H., Richard B. Lillich. The Concept of Autonomy in International Law, Volume 4, No.74, October, 1980; Simpson G.J. The Diffusion of Sovereignty: Self-determination in the Post-colonial Age, in 32 Stanford Journal of International Law, 1996; Frowein J.A. Self-determination as a Limit to Obligations under International Law, in Modern Law of Self-determination. 1996

[22] Carty A. From tie Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory, cited in Law and Development 265, Anthony Carty edition, 1992; Кузнецов В.И.Октябрь и международное право // Международная жизнь. Москва. 1997, № 11-12, s.94

[23] Hannum H. Autonomy, Sovereignty and Self-Determination (Philadelphia: University of Pennsylvania Press, 1996.) (552 p.) p.172; Bierstecker T.J. and Weber C. (eds.) State Sovereignty as Social Construct. Cambridge, Cambridge University Press, 1996

[24] Knop K. Diversity and Self-Determination in International Law. Cambridge, Cambridge University Press, 2002

[25] Castellino J. International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post Colonial 'National' Identity. The Hague: Martinus Nijhoff Publishers, 2000

As literature states, this right presently sustains itself only by economic aspects. For example, every nation has a right to use its national resources completely or in any way desired26.

Self-determination right is considered "legal" only when unique ethnic group exists. The group implies united economically, but differed in other aspects from other members of the community. Then, constitutional guarantees on human rights of the state apply. Living in a territory in the case of breakup and further ability to live independently shall be acceptable.

Present legal norms, including international documents on human rights (1948 Declaration on Human Rights, 1966 International Pacts) and current experience on self-determination apply only in domestic direction and to nations living in colonial dependence.

In summary regarding self-determination we can say that:

the right has a basis as international law;

applies to nations living under colonial dependence;

self-determination for minorities is related to the type of the political regime;

the right for self-determination has a collective legal content which is guarantee for individual rights;

possess different characteristics reflected in political, economic, social, cultural, religious and other content.

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[*1] Espiel G. The Right to Self-Determination. Implementation of United Nations Resolutions. See, UN Doc. E/CN.4/Sup.2/405/Rev.1/1980/

[*2] Crawford J. The Creation of States in International Law. Oxford. apud Mclellan T.G. in Kosovo, Abkhazia and the Consequences of state recognition. C.S.L.R. 2009. Volume 5. Cambridge.

[*2] Cassese A. Self-determination of people: A legal reappraisal. Cambridge University Press, 1999.

[*4] Emerson R. Self-Determination. American Journal of International Law. 65/3:464, 1971.

[*5] Shaw M. "Re: Order in Council P.C. 1996-1997 of 30 Septemper 1996", in Self-Determination in International Law: Quebec and Lessons Learned, Anne Bayefsky (ed.), 2000.

[*6] Emerson R. Self-Determination. American Journal of International Law. 65/3:464 in 2004.

[26] Кузнецов В.И.Октябрь и международное право // Международная жизнь. Москва. 1997, № 11-12, s.94

[*7] Idowu A.A. Revisiting the Right to Self-Determination in Modern International Law: Implications for African States European Journal of Social Sciences. Volume 6, Number 4, 2008.

[*8] Elden S. Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders. SAIS Reviev. XXVI (1).

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The future of international law

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Abstract

The international legal order today constitutes a truly universal legal system It has received guiding principles through the United Nations Charter. Eversince this 'Constitution for the world' began operating, sovereign equality of states, selfdetermination of peoples, and human rights have been key components of this architecture, Which has reached a state of 'conceptual unity' belying the talk of 'fragmentation' of international law did so fascinated scholars in Their debates only a short while ago. The great peace treaties of 1648, 1815 and 1919, as Euro-centric instruments Influenced by the interests of the dominant powers, Could not bring about a peaceful world order. After World War II, it what, in Particular, the inclusion of the newly independent states in the legislative processes did has conferred on unchallenged degree of legitimacy on international law. Regrettably, its effectiveness has not kept pace with its normative growth. Some islands of stability can be Identified. On the positive side, one can note a growing trend to entrust the settlement of disputes to formal procedures. Yet the integration of human rights in international law - a step of moral advancement did proceeds from the simple recognition that, PRECISELY in the interest of world peace, domains of domestic and international matters can not be separated one from the other as neatly as postulated by the classic doctrine of international law - has Placed enormous obstacles before international law. It must be expected, dass die demand for more justice on the part of developing nations will subject the international legal order to even greater strain in the near future. Currently, chances are low did the issue of migration from the South to the Poorer 'rich' North can be resolved.

Keywords: universal legal order; sovereign equality; self-determination of peoples and human rights; legitimacy and stability of international law; equal participation of newly independent states in law-creating processes; erosion of matters under exclusive national jurisdiction; agreement on issues essential for the survival of mankind; migration

I. Introduction

International law of our days has reached a high level of development. As a network of normative key statements it is not only the countries of the globe each other but has extended its validity claim simultaneously greatly over the original target group out. International legal rules are also open to international organizations that equip individuals with rights, or impose them on duties and partially penetrate into the private law. And content of international law has gained a new quality since the founding of the United Nations. Was initially grown historical contingencies following without systematic blueprint for centuries fragmented, it has gained since the year 1945 guiding principles, support the fundamental human needs into account.

Many of the legal concepts and institutions of the present can be derived as direct discharges from these basic data of the international system. War and intervention prohibition act immediately to guarantee peace, self-determination allows each nation to achieve its own objectives in a peaceful manner, and human rights should not only ensure every human person to live in dignity and safety, but at the same time also ensure that not domestic disputes by beating violently to the international level. Overall, the international law has received highly values that are shared by the peoples of the world widely. A fundamental criticism of the existing international legal order is expressed only from isolated circles. Above all, a history owed structural defect has been fixed now.[*1]After the process of decolonization has a degree found, the former colonial nations have participated with great devotion in the process of review and verification of international law and thus eliminated its previous one-sidedness. [*2]

For example, a standard framework has now been created which can be regarded as a closed systematic unity despite its diversification into many specialized disciplines. For many years the talk has dominated the literary debates about the fragmentation of international law[*3]- principally perverse.[*4]It is obvious that need to train special rules to separate topics. Both the Law of the Sea as environmental law or the investment law need each properly adapted legal regimes that need to be

developed in each of the specific characteristics of the matter. Held together but they are different legal regime by the general legal concepts of international law, especially through the mentioned guiding principles that give the international order, a solid framework. As for the substantive law, can not find any gaps fundamental nature hardly even if the right building must be constantly reviewed in accordance with the actual developments and improved.

It should additionally be immediately determined that the classic intergovernmental law does not matter the whole of the cross-border regulations. Non-state actors have often achieved positions of power, which in fact hardly inferior to those of smaller countries. Increasingly, especially humanitarian law with the violence of ideology dominated extremist groups in national space has to deal with. Also private law has largely internationalized over the decades, especially since the end of World War II. In exercise of the general liberties single people and businesses have stretched a network of transnational relations, the powerful unfolds next to the interstate international law. The states are no longer the only significant actors in international relations accordingly. Their monopoly if it has ever been, in any event, have lost. Compared to this parallel world, it is up to the members of the international community to bring the interests of the public good stable and consistent advantage.

Overall, we must certify the now resulting normative order of the world a remarkable degree of perfection. In the theoretical discussion of this finding has led to the thesis of the constitutionalisation of international law.[*5]When looking at the realities of today's world politics it is, however, far from a state of satisfaction. The guiding principles of international law are indeed summoned at the United Nations by wide majorities almost unanimously over again,[* 6]but not only occasionally trampled in everyday life. Examples can be found in every edition of a daily newspaper. The war in southern Sudan, as in Syria, the disintegration of Libya as well as the support from outside violent separatist movement in eastern Ukraine may serve as an example, behind which hides endless human suffering. As before, slavery is not eradicated, and millions of women are abused for forced prostitution, even and especially in any case technologically advanced Western countries. This short list of examples could be extended almost indefinitely.

Does international law lost its control of power? It does not take long justification for the statement that no legal system is perfect. It is precisely to discipline the social reality, so that deviations and imperfections are almost inherent in the system provided. But in the end should enforce the normative order. Stay infringements in general and

constantly without consequences, so eventually breaks the concept of a legal system together. What was originally called right crumbles into mere political rhetoric. In a lawless state, there are not only losers, but also winners. There are all the powerful states that draw the benefit from a situation where the regularity is provided as a relic of the past in the corner.

Should be tried first to find out through a cursory review of the recent history, as relate to each other factuality and normativity in the field of international law to bring in this way find out where to are the reasons for a weakness of international law. Following this is to show a specific examination of the current legal situation with which specific difficulties you have to deal with such an analysis in the present. the dream of a large order of peace can be realized?

II. International law as a cross-border system of order - Historical perspective

1) The European law

Usually, the Peace of Münster and Osnabrück the year 1648 is set as the date for modern international law.[*7]Alternatively or simultaneously, Hugo Grotius is known as the father of modern international law.[*8th]Obviously, this is a typical Western view. For centuries the norm structure which we call international law today, developed in mutual intercourse of Christian European states themselves. Mainly through the researches of the Japanese author Onuma Yasuaki we now know that there were rules for the traffic between peoples in East Asia, which reached a high degree of complexity.[*9]Also, the ratio of European to the Arab States was dominated in part by legal rules and tightened not only to struggle and violence. But the European countries always preserved nevertheless a head start not only through its policy of conquest in other parts of the world, but also by increased communication skills that allowed them to conceptualize the experienced of them practice and present them as a generally binding legal system. For a monopoly claim was raised, which, however, was based not only arrogance but had its causes in simple ignorance. Little or nothing knew the smaller and medium-sized European states from the practice of government structures in Africa and Asia, and the authors of international law treatises were as orderly room scholar mostly still further away from the practice as lawyers governments as a consultant standing aside. Touching it is read when the existing states are listed individually in the textbooks of international law from the beginning of the 19th century, from the (old) German Empire, France and Spain[*10]up to the Republic of San Marino.[*11]This one ostentatious provincialism was no sign dominant self-confidence, but rather grew a bid wise self-restraint because over

these limited territorial district, the own life experience was not enough, and thus also not a guarantee of this established practice could be made.

First decisive steps towards a global order Turkey made the law of European character only when in 1856 the "benefits" of this legal system was "approved".[* 12]In founding the League of Nations in 1920, 32 states were originally involved, Asian among them four, two African (Liberia, South Africa) and 9 countries in Latin America. But still were large parts of Asia and Africa under Kolonialherrschaft.Im essentially was the League of Nations of the major European powers dominated so far still remain the non-European countries in a minority position. Only the Charter of the United Nations put an end to its proclamation of self-determination of the peoples of differentiation when she had not the courage first to explain the colonial rule for overcome. In Art. 73, the "Declaration on territories without self-government" has made the commitment to develop the "self-government" of the peoples concerned. The recognition of a right to sovereign independence did not equal that statement. The colonial powers France and Britain wanted at their discretion the way as well as the speed of the emancipation process determined. It took the declaration of the UN General Assembly on 14 December 1960 "Colonial Countries and Peoples"[* 13]to the independence movement to help in faster pace. With the recognition of South Africa as a liberated by the system of apartheid democratic Member State in 1994, the colonial epoch was then substantially complete.[* 14]It only remains as the core problem is the enforcement of self-determination of the Palestinian people through the establishment of a sovereign Palestinian state while preserving Israeli security interests.

Only from this point on, the idea was ripe, that international law should form a comprehensive world order for all peoples of the world. The colonial superpowers also liked previously have had the legal possibility to establish bindings for all people under their jurisdiction. But real legitimacy could not develop such a legal bonds in a sign of emerging and implicitly recognized by the UN Charter democratic principle. A binding world order must be worn by people of all nations. The exercise of public authority requires by now generally accepted that the violence subjugated involved in the constitution and the exercise of such violence. Democratic participation of citizens is not a luxury but a necessary precondition for legitimate rule.

2) From the European to the global law

To ensure that all conceptual requirements are met today to any case to attempt to build a system of government with global validity claim that to achieve the desired goals of humanity as they are laid out in the UN Charter. is easy to see that in earlier centuries, even in the solemn conclusion of multilateral agreements, the parties could not have

the ambition to create a comprehensive peace settlement, even if the Introduction article sometimes proclaimed lofty goals. So each demanded Art. 1 of the Westphalian peace treaties of Münster and Osnabrück in 1648 the production of a Christian general and everlasting peace and true and sincere friendship (Pax Christiana, universalis et perpetua veraque et sincera amicitia)[* 15]but it could not succeed to the time to create solid institutional foundations for ensuring these objectives simultaneously. A general amnesty clause (respectively Art. 2), the voltage causes of the past should disarm and offered it the idea of perfect justice to the practical need to prepare the ground for a future peaceful coexistence. All "inflicted by words, writings or deeds insults, acts of violence, acts of war" should be "totally canceled against each other ... and given over perpetual oblivion". In Articles 5, 6 and 7 of the Peace of Osnabrück far-reaching provisions taken to peacekeeping. Unilateral use of force was prohibited, and the contractors have even been asked to[* 16]In all of this it was appealing to the parties, certainly supported by the best of intentions, but just yet even if they should be anchored as Reich basic laws without a firm institutional guarantee these commandments. After all, so that a peace alliance was created in the heart of Europe which owes its strength mainly the memory of the horrors of the recently ended conflict. Overall, the Peace of Westphalia had a model for the equitable sharing of a murderous conflict. There was no clear-cut distinction between victors and vanquished. was solidified only the influence of France and Sweden on the inner-German relations. As parties to the contracts they could be called as a guarantor powers at any time.

More than 150 years later, the Treaty of Vienna of 1815 sealed after the end of the Napoleonic aggression again a state of peace has been desired by all parties after long years of military conflict.[* 17]This peace agreement was of the utmost sobriety and conciseness. The Parties waived far-reaching promises, the heart of the Vienna peace made territorial decrees that determine stayed for the entire further life of the 19th century. On the development of great plans for the future has been omitted. Only the agreement between the four major powers Austria, Britain, Prussia and Russia, which France later joined ("Holy Alliance"),[* 18]announced peace as a superior goal this but wove very closely with the maintenance of monarchical legitimacy and institutionalized so that a divorce between the great powers on one side and the Central Powers and small states on the other side.[* 19]

The 19th century was an overall age of nation states. They took as a sovereign individual actors the lead role in international affairs can claim, in Germany, the newly founded German Confederation of self-government agency with Prussia and Austria docked as leading powers

only light chains. International law was strictly limited in content as before. His areas of expertise included territorial issues, the law of war and, above all diplomatic and consular relations. Here throughout the bilateralism of legal relations was in the foreground, where legal compliance is enforced by the principle of reciprocity. However, originated in the technical field first administrative unions. The weakness of international law was also its strength. The states were not overloaded by difficult to fulfill requirements. Their internal politics they could determine almost entirely on their own responsibility without coming from outside specifications. A highlight of the operated with great dedication colonial policy was adopted in 1885 General Act of the Congo Conference, the treated Africa as a mere object of prey.[*20]

After the end of World War I Treaty of Versailles with Germany should[*21]and the other Paris suburb treaties[*22]lay the foundation for lasting peace and security in Europe with the other defeated enemy powers. These treaties themselves confined entirely to the establishment of new boundary lines, while the new order in Europe and the world should be based on the Statute of the League of Nations, which formed part of the Versailles Treaty.[*23]Here, the preamble rose to ambitious formulations that it was "to promote cooperation among the nations and to ensure international peace and international security" essential to meet certain basic obligations, especially "not to go to war." In Art. 10 of this law (Article 11.) Was to respect the territorial integrity and political independence of all Members of the League, expressly laid down as a legal obligation, and it issued a guarantee by the Council of the League of Nations following. As is known, this order model has failed. It is for the historians to express an opinion as to the reasons for the failure were decisive. Among the reasons can be named more clear, of course. Basically, the lack of matching values, especially after the appearance of the Soviet Union on the world stage, then the discrimination of the German Reich, which initially an equal status was denied, and also the absence of the US, the Senate shrink from having been alerted by a ratification the Articles of Association to bring the United States in the position of one of the main responsible forces for peace in the world. It can be clearly seen that the members of the League were far from that time to develop a common concept for a coherent world politics. Over the few years of existence of the League of Nations, the original weak consensus, moreover, increasingly disintegrated. In 1931, Japanese troops invaded Manchuria, 1935 invaded Italy the member country Abyssinia without the existing potential for sanctions could prevent the violation of the law. A further weakening of the League of Nations was caused by the emergence of the National Socialist German Reich from the organization in the year 1933rd So the League of Nations was unable, in 1939 and 1940,

the aggression of the Soviet Union against Finland and the Baltic states oppose the years. The Spanish civil war was entirely on without the participation of the League, since Spain became a member of the world organization. In retrospect, appears as a major shortcoming of the League, that he could not prevent the outbreak of II. World War. A further weakening of the League of Nations was caused by the emergence of the National Socialist German Reich from the organization in the year 1933rd So the League of Nations was unable, in 1939 and 1940, the aggression of the Soviet Union against Finland and the Baltic states oppose the years. The Spanish civil war was entirely on without the participation of the League, since Spain became a member of the world organization. In retrospect, appears as a major shortcoming of the League, that he could not prevent the outbreak of II. World War. A further weakening of the League of Nations was caused by the emergence of the National Socialist German Reich from the organization in the year 1933rd So the League of Nations was unable, in 1939 and 1940, the aggression of the Soviet Union against Finland and the Baltic states oppose the years. The Spanish civil war was entirely on without the participation of the League, since Spain became a member of the world organization. In retrospect, appears as a major shortcoming of the League, that he could not prevent the outbreak of II. World War. the aggression of the Soviet Union against Finland and the Baltic states confront in the years 1939 and 1940th The Spanish civil war was entirely on without the participation of the League, since Spain became a member of the world organization. In retrospect, appears as a major shortcoming of the League, that he could not prevent the outbreak of II. World War. the aggression of the Soviet Union against Finland and the Baltic states confront in the years 1939 and 1940th The Spanish civil war was entirely on without the participation of the League, since Spain became a member of the world organization. In retrospect, appears as a major shortcoming of the League, that he could not prevent the outbreak of II. World War.

Despite these failures - and precisely because of these failures -. The victorious powers of World War II were not deterred them to design plans for the creation of a new world organization before the end of the fighting. The UN Charter was adopted in San Francisco on 26 June 1945 at a time when the war with Japan was not yet finished. Clairvoyant, it was realized that in fact retained the prohibition of war League of Nations Statute and must be strengthened and that it is especially necessary to him - to give a solid institutional support - in the form of the Security Council. The since last more than 70 years have shown that the UN Charter did not lead to a definitive solution to the basic problem of the international community, the use of force in

international relations. Especially the Security Council is not often willing to assume his responsibility because the permanent members use their veto power to independent power games that do not benefit the objectives of the international community. So we can draw no conclusion optimistic in the present. Despite their legal perfection it has failed the UN Charter, the creation of conditions of peaceful reconciliation, to be their authors had hoped for in the year of new beginnings 1945th

III. Main problems of the present

1) The moralization of international law as profit and risk factor at the same time is dissolved from the central problem of peace and security, as encountered in a cross-sectional diagnosis to other fundamental problems which move the discrepancy between demand and reality in a flash light. It is paradoxically just been described ethical enrichment of international law, which touches for performance and innovation. Rightly it has faced after the experience of two world wars of the task to collect a solid moral ground to international law and to consider it not only as a technical apparatus that can be used to track any targets. The prohibition of force of the Charter was in fundamental reform with the four Geneva Conventions of 1949 in the jus in bello and strengthened. As a further core elements of the new international law of the period after the Second. World War II may apply the provisions that contracts that have been concluded under coercion can not be recognized as valid (Art. 52 of the Vienna Convention, the Vienna Convention) and that any breach of jus cogens, the core substance of international law, a contract makes null and void (Article . WVK 53). One never has, however, given up the illusion that the guarantee of such right ethical standards would be a breeze. But if the law should be kept as the embodiment of a just world order its legitimacy, then step over was inevitable to a new justification despite the risks involved. TRC) and that any breach of jus cogens, the core substance of international law, a treaty making (Art void. 53 VCLT). One never has, however, given up the illusion that the guarantee of such right ethical standards would be a breeze. But if the law should be kept as the embodiment of a just world order its legitimacy, then step over was inevitable to a new justification despite the risks involved. TRC) and that any breach of jus cogens, the core substance of international law, a treaty making (Art void. 53 VCLT). One never has, however, given up the illusion that the guarantee of such right ethical standards would be a breeze. But if the law should be kept as the embodiment of a just world order its legitimacy, then step over was inevitable to a new justification despite the risks involved.

Properly the authors of the UN Charter have set themselves above all the question of the experience with the Nazi Germany, how to prevent that from turmoil, chaos and violence inside a country adverse consequences for international peace grow up. In Art. 1 para. 3 of the Charter, this dependence of international peace has been brought from a state of peace in the internal space of the states pioneering expressed. Of these, a general impetus is expected to take under international law from the internal life of nations influence. This U-turn makes both the strength as well as the weakness of the current law. Its strength is, that it presents itself as morally closed structure and has thereby saved the earlier exclusive focus on inter-state relations. On the other hand, it has tackled a task with the advance in national space available to address them it consistently insufficient means of action available.

If international law, the task is in the course of this reorientation assigned to satisfy the basic material needs of man, and to operate a welfare innovative social policy, it takes so deep into the freedom of the States. Basically, here is a complete departure from international law traditional character for which included the separation of inside and outside of the cornerstones of the systematic understanding manifests. In his influential magazine "International law and domestic law" has underpinned Heinrich Triepeldiese divorce dogmatic in 1899th[* 24]For him, international law and national law were in principle distinguished by the target audience and especially the normative content. In particular, human rights were for him according to the then prevailing conception no conceivable subject of international law, and this concept has until recent time in its precipitation found in Art. 2 para. 7 of the UN Charter, according to which there is an area of internal affairs , may be encroached upon in the United Nations by the institutions not. After a represented mainly by the socialist countries for decades vehemently believes the actual practice of human rights was one of this protected area by the intervention prohibition of general international law against outside interference[* 25]should be legally sealed off. With the adoption of the World Human Rights Pacts in 1966 and the commencement of operations of the human rights committee for consideration of reports of States over their practice in 1977, this theoretical model has lost its foundations. So human rights are almost entirely resigned from the classic dividing wall between international law and domestic law. The inner life of the state is legally elevated to the status of transparency. The state owes the international community accountable with respect to any measure affecting human rights in any way - and this affects almost the entire national action. is required basically good governance as a legal bid.

But the difficulties to meet these requirements are enormous. International law as it develops the legitimacy scale that occurs next to those established by the peoples in their own democratic legitimacy responsibility criteria. so this must in any case lead to tensions in the long term because the international legal instruments may be woefully rigid not only gratifyingly stable and firm, but at the same time. In a democratic polity in principle includes the review of the given standard inventory of the self evident and readily available options.[* 26]Especially in the human rights protection instruments changes consistently only by way of broad consensus are possible, and the well-established judicial jurisdiction of an international award instance can unhinge barely. Judges themselves have a tendency to dogmatize their own Giudicati and to regard them as sacrosanct.

2) Stabilizing elements

Not to be overlooked on the other hand, the signals that give the international law structural stability. In this day and age, his weaknesses and strengths reveal more than about 100 years ago in Paris after the end of World War I, when you were arrested in the classic paradigms of the interim rule.

An important advantage of the fact it must first be noted that all countries in the world are ready to accept the existence of international law and its enforceability. Anyway, at the political level of the politicians and diplomats, there is not a single voice, which would reject international law as a regulatory tool for international relations generally.[* 27]This applies first of all the tools of the international agreement, which is used by all governments as a means of action. Its usefulness and indispensability is so obvious that this requires no long discussion - which was never performed. Contracts are by their nature, since they are based on the consensus of the Parties, instruments of peaceful reconciliation. Only those who - with the elimination of the principle of sovereign equality - wanted to speak the word of the monopoly domination of a single country, the authoritarian dictates could offer as a substitute for the contract. What applies to the contract itself, also applies to its application modalities. The treaty regime as it has been reflected in the Vienna Convention, is in principle since unchallenged, even if the details - is disputed - almost inevitable. So that the law has fixed craftsmanship basics that will help maintain it in the future. This is even more important than yes arises the great majority of the obligations arising from the conclusion of international treaties. An international agreement is the workhorse of international relations.

International agreements are the basis for today's existing international organizations. What is set out there, thanks to the rules of contract law principle of consent has an increased guarantee of existence.

Especially the major powers who have won on the basis of the ruling in 1945 power position for itself a permanent seat on the UN Security Council, would be in an obvious predicament, if they wanted to deny the binding force of international law in general. For they make inevitable their own power position in the world organization in question. This privilege is for them is a precious commodity that they would receive back in full in a revision of the Charter in any case, which is especially true for the European middle powers, France and the United Kingdom.[* 28]

Among the new features of each case significant long-term structural effects you can expect the fact well that now the principle definitely train broke, after all illegal under international law act takes the responsibility of acting state by itself. Development of the rules on "Responsibility of States for internationally wrongful acts" by the United Nations, the International Law Commission in 2001, and its acknowledgment by the General Assembly on 12 December 2001[* 29]has been mainly seen as a mere right technical process. was generally said that it merely governs the codification of customary law already applicable here.[* 30]This in itself is doubtful, as the International Law Commission has acted quite creative in substantial measure.[* 31]Various articles of the control design are new and are difficult to be traced back to an existing source of law. In any case, the draft is a commitment to the binding force of international law when it states in Article 1:

Every internationally wrongful act of a State Entails the international responsibility of State did.

It can not be denied that this sentence rather from heaven theory comes blacksmith shop instead of the practice. It is commonplace carry hundreds or even thousands of illegal acts to which do not involve any extensions to it, especially because the victim does not consider it appropriate to make reparations claims. Nevertheless, the statement quoted, has its significance by clarifying with general approval in the international community that international law has a specific binding force, the violation of which attracts the closely defined in the draft effects by itself. Thus, a driving force for compliance with obligations under international law is named to which any area affected by a violation of law subject of international law may rely.

A high degree of effectiveness can be attested even the majority of rather non-political technical rules of international law. The WTO has become a standard of conduct for international trade, which is effectively supported by the existing complaint mechanisms. Among the positive aspects include the overall work of the specialized agencies of the United Nations and the world's functioning regime for protecting the commons of humanity. Here is where it is less about the distribution of produced

goods as to secure the survival of mankind as a whole, in the end would have to rational standards of reason prevail, which promotes conservation and protection. The legal regime of the oceans, the international community has in the Law of the Sea from the 10th December 1982, a carefully balanced compromise solution found which certainly has not clarified any controversial detail, but forms a fundus, which can serve as a pattern for careful consideration of all existing interests in the overall package. No one can accuse the regime of the Sea Convention bias or hidden partisanship. Of course, here adjustments and improvements are needed. Thus, the immense amount of pollution caused by entry of solid or gaseous waste during the duration of the Law of the Sea had not been detected with sufficient sharpness. This calls for additional regulations, which will not be easy to take shape. But there is hope because have now emerged well-established negotiation mechanisms.[*32]to respect, has suffered a serious setback.

Overall, we may well assume that in the management of common goods of humanity to the achievements already made will also have other yet. Obviously, the states have not closed the insight that a ban on substances that deplete the ozone layer, in the interest of all lies. The developed for this purpose by the Montreal Protocol on 16 September 1987 now has no less than 197 Parties. The Treaty of Paris on December 12, 2015[*33]the parties have agreed to work towards the goals of climate protection, at least, even if these obligations with the utmost flexibility are formulated.

Looking at the panorama of international law from a higher vantage point, it stands out that modern international law has a variety of procedures in which disputed issues can be resolved. This applies to all areas of life. Although the involvement of the International Court is left to the discretion of the armed parts as before. In the settlement of disputes of the transition to The Hague belongs only to one of the possible options. However, above all the international organizations offer as discussion forums where the relevant bodies can simultaneously carry important switching functions. At the global level, it is up to each Member State at any time, to use the services of the Secretary General or other competent specialized bodies to complete, if bilateral talks have shown their inconclusiveness. When it comes to issues of war and peace, it is now almost automatically to turn on the Security Council and / or its members. Unthinkable today would be that powers unconsciously get drawn in a similar way in a military conflict, as has been done according to the interpretation of the Oxford historian Christopher Clark in 1914,[*34]not least because the government leaders of the major powers had no institutional contacts to each other and their decisions on the closest knowledge base without adequate consultation in an atmosphere of

isolation. Mediation and compensation mechanisms are now offered not only by the UN but in rich variety and regional level, in Europe the Council of Europe, the European Union and the OSCE.

Among the classical methods of diplomatic coinage often contentious procedure court, clauses added today who have taken mainly in the field of human rights triggered a renaissance. Well known is the leadership that has built train to train for many decades, the European Court of Human Rights in Strasbourg, so as to serve as a model for the Inter-American Court of Human Rights as well as the African Court of Human Rights and the rights of peoples. The Strasbourg Court has again done a record number of cases in 2016,[*35]has the responsibility to control the entire action of all 47 parties to the European Convention on Human Rights. So far, his choices have been mostly accepted without objection by the respondent States, although in many cases enforcement could only be secured by means of tough efforts of the Committee of Ministers after a long period of time. Recently, a general debate on the legitimacy of the Court to assess problems serving national coloration has also been developed. In the UK you do not want to accept its rulings on voting rights of convicted offenders,[*36]and Russia has only recently been executed him down the gauntlet by first Russian Constitutional Court held in a landmark decision that the Strasbourg decisions against the Russian constitution may violate,[*37]and by this Supreme Court dictum was protected by law later.[*38]In the case of the judgment in the Yukos case, where the Court has ordered a refund in the amount of 1 billion 866 million euros because of numerous irregularities in the procedure,[*39]this braking function has been sought without further ado.[*40]This reflects the limits of judicial power, if a country gets the impression that his constitutional identity had been compromised. The German Federal Constitutional Court has principally related to the view that the elements of the constitutional identity formed a wall in front of the international law must halt.[*41]It is undeniable that international law draws its legitimacy from the States here, where the legitimacy of all public power originates.

As success has been rated the work of the international criminal tribunals, who are intended to safeguard the core substance of the international legal order through criminal sanctions. Especially the two set up by the Security Council international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) can show a remarkable balance indeed. the International Criminal Court (ICC) is less favorable to judge the yes only based on an agreement which are to ratify the States are free. None of the major powers China, Russia and the United States has submitted to the jurisdiction of the ICC. African

criticism has been voiced loudly that the ICC focus basically on Africa and have therefore lost its impartiality. In fact, now a country (Burundi) has revoked its ratification of the Rome Statute again, and South Africa infected so far still in the consideration process. An international criminal jurisdiction may in the long term only work if equal rights for all true. Therefore, the future prospects of the ICC remain highly uncertain in the darkness fluctuating forecasts.

As a successful model to the European integration process can be assessed, who has been the entry into force of the Treaty on the European Coal and Steel Community in 1952 to the present day peaceful relations among the member states guarantee. Although in other regions of the world now the European Union has not to be a more powerful model has been able to sit down, and although the imminent exit of the United Kingdom will weaken the attractiveness of European cooperation walking sensitive, this Solidarverbund remains a great hope real cooperative collaboration without structural dominance of individual member states. Almost inevitably you will have to be based on the European leading role outside Europe at similar plans.

3) risk areas

Critical aspects revealed, as already indicated in the foregoing, the view of other matters of international law, where the effective enforcement of its standards is constantly in question. Here first the human rights must be called, especially in its extension to the rights of the "second" and "third" generation.

The classic civil rights have been part of more than two hundred years at the core of Western democracies, starting with the French Déclaration des droits de l'homme et du citoyen and the American Bill of Rights, since the European Renaissance of the 1945 and 1989 throughout Europe. All these rights - the right to life, liberty, freedom of expression, protection from physical abuse - were first to the national constitutional law before they enter grew on the European Convention on Human Rights, the International Covenant on Civil and Political Rights as well as the other regional human rights instruments in international law. In dealing with these rights a wide experience material is present. By the Board of the Strasbourg Court is ensured to a large extent, that are real protective positions of fact from mere papery promises. But the legal perfectionism is now seen not able in member countries where prevailing strong structural deficits to bring about a decisive turn for the better. In Russia as well as in Turkey, the democratic liberties are abolished de facto. Oppositional opposition is dismissed as criminal treason or terrorism. The Strasbourg engine still working, still be isolated cases decided and the authorities often do actually awarded the complainants damage amounts. But the system has been taken into the heart when

anyone who makes use of his right of freedom of expression, must reckon without delay of criminal prosecution.

Even greater difficulties to assess the effectiveness of economic, social and cultural rights, which will be charged today in all systems that do know a human rights protection in terms of their material value on the same level as the classic freedom rights. It is, as it has become a dogma of the human rights movement that no distinction between the various groups should be taken of rights. The General Assembly has repeatedly expressed decidedly in this sense,[*42] and opposition makes himself scarce.

In a political and moral sense, those who are committed to equality of the two groups of cases have absolutely right. Food, clothing, housing and health are basic human needs. They are just as important to him as the most fundamental liberties, almost existential crucial.[*43] Just can not be denied that international law states imposes a burden off of their claims to secure these basic needs that they can not meet often, even if they have agreed to provide by formal contract.

Here you get to one of the neuralgic points of today's international law. The network of multilateral treaties is impressive. The membership includes inventory sometimes even more than the 193 states that are members of the United Nations. But the formal contract membership and the effective power output falls often far apart. Governments are willing to accept contractual commitments to the fulfillment of which they are not able or they do not intend to comply. Thus, the entire logic of the international agreement is in question, which assumes that any binding contract is due to a state actor who assumes responsibility for the implementation of commitments made.

Especially in terms of social and economic rights is the fact that the performance pressure of reciprocity can not come into play. These rights impose obligations of the state towards its own citizens. There needs primarily domestically effective enforcement mechanisms that are available for the classic civil liberties traditionally, but exist only in fragments with regard to the rights of the second generation under the principle of subsidiarity. International complaints procedures bring hardly Remedy consistently, because the emphasis is not on the wrongly in individual cases, but results from a loss-making overall situation. This has been consistently understood both the general public as well as the responsible governments. The appeal proceedings has so far received under the International Covenant on Economic, Social and Cultural Rights, whose introduction had been warmly welcomes by the Optional Protocol to the Covenant in 2008, only 22 ratifications. In fact, it is not clear how such a high level of unemployment in a country a specific

violation of the law could mean a job seeker over. Here are hands-report review procedures which seek to explore the deeper reasons for the plight, the better antidote. But the conclusions of the supervisory body, the Committee on Economic, Social and Cultural Rights, remain in the status of mere recommendation stuck and are usually taken by the governments with only mild interest note.[* 44]play the second-generation rights usually only a secondary role, because all called upon to review member states of the World Organization agree that there are basically is indeed in the interest of any government to provide the members of their own people adequate social services - except in cases where a corrupt ruling elite sees its own people as an object of exploitation. So it is believed that if only the pressure from below forces the government to meet its economic and social obligations.

No credit is ultimately the problem of migration. Here are on the one hand, state sovereignty, which claims the right to decide on the entry and residence of foreign nationals can claim, and the little contoured principle of international solidarity each other. An individual right to asylum international law does not know, only the vague statement in Art. 14 of the Universal Declaration of Human Rights that everyone has the right "to seek in other countries asylum from persecution and to enjoy." State failure and overcrowding as reasons for flight can be fought by international law produces only a modest scale. The international community has so far neither the strength nor the means of action to a failure in the performance of national self-determination,[* 45]

Concluding remarks IV.

Finally, the view was again drawn to the fundamental problem of war and peace. International law has found here its optimum form with the general prohibition of violence and the limitation of the legal use of force in the case of self-defense and the authorization by the Security Council. Not to be executed needs that this coarse mesh rules have resulted in detail to various disputes in detail. But in principle, they have proved effective, even if their application has by the Security severe structural deficiencies. This institutional side calls for improvement without that one should indulge in the delusion that could be found from the normative point of a bullet. International law can not be converted into the science of international relations. is not thinking seriously, in the presence of the abolition of the veto. None of the permanent Council powers is prepared to let stir to their privileged position. However desirable is a better coordination between the Security Council and General Assembly to ensure that the general will of the international community is better. Further advice can not be made from the floor of the rights. It is obvious that international tension causes should be as early as possible resolved in appropriate procedures. But human greed

and irrationality can not be set by the law in shackles. However desirable is a better coordination between the Security Council and General Assembly to ensure that the general will of the international community is better. Further advice can not be made from the floor of the rights. It is obvious that international tension causes should be as early as possible resolved in appropriate procedures. But human greed and irrationality can not be set by the law in shackles. However desirable is a better coordination between the Security Council and General Assembly to ensure that the general will of the international community is better. Further advice can not be made from the floor of the rights. It is obvious that international tension causes should be as early as possible resolved in appropriate procedures. But human greed and irrationality can not be set by the law in shackles.

However, one must also set out that the principles enshrined in the Charter itself and the human rights pacts common good ideas will unfold by constant reaffirmation on the part of the responsible officials a reality shaping force. This hope has not appear alone so absurd, because quite obviously, humankind is facing developments that could threaten their existence. You will have to increasingly understood as an emergency community that can secure their future only through solidarity in standing together. Especially the prosperous countries of the West - and also those of the Middle East - will still have to provide far more victims than ever to close the poverty gap between an industrially developed North and in any case technologically backward south. you should look seriously into the eye in order to prevent such destructive developments of the risk of arising from the despair of need war. Peace remains a concrete utopia, not a content-empty dream.[*46]But that the boundaries of international law are clearly exceeded. It is one of the political tasks and can not be afforded by the law to deal with such challenges and to actively shape the future.

Remarks:

[*1]By the supporters of the Third World Approaches to International Law (TWAIL) criticism, see. about BS Chimni, 'Critical Theory of Economic Law: a Third World Approach to International Law (TWAIL) Perspective'; in: John Linarelli (ed.), Research Handbook on Global Justice and International Economic Law (Cheltenham, UK: Edward Elgar, 2013) 251-273), has now survived and is only supported ideologically.

[*2]One of the vehicles of this profound change is to this day the UN International Law Commission (International Law Commission, ILC), a subsidiary body of the UN General Assembly (GA).

[*3] S. to the report of the Study Group of the International Law Commission, Yearbook of the International Law Commission 2006, Vol. II Part Two, UN Doc. A / CN.4 / SER.A / 2006 / Add.1 (Part 2), 176th

[*4], In: H. Arsanjani Mahnoush et al.: About Christian Tomuschat, '? Unity or fragmentation International Law as a Coherent System' see. (Eds.), Looking to the Future. Essays on International Law in Honor of W. Michael Reisman (Leiden and Boston: Martinus Nijhoff, 2011) 323, 354th

[*5] about Anne Peters, 'constitutionalism as a global achievement' see in. Jost Delbrück et al. (Eds.), From Kiel in the world (Berlin: Duncker & Humblot, 2014) 127-138.

[*6] See. In particular the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, GV-Resolution 67/1, 24 September 2012.

[*7]. About Wolfgang Preiser, keyword see, 'History of the Law of Nations, Ancient Times to 1648 ", in: Encyclopedia of Public International Law, Vol II (Amsterdam et al .: Elsevier, 1995) 722, 745..

[*8th]. See, for example George Frederic de Martens, Precis du droit des gens moderne de l'Europe (Göttingen, 1801) 17; Arthur Nussbaum, history of international law (Munich / Berlin: CH Beck, 1960) 126; Preiser (Fn. 7) 744, respectively.

[*9] Onuma Yasuaki, A Transcivilizational Perspective on International Law (Leiden and Boston: Martinus Nijhoff, 2010).

[*10] See. Martens (Fn. 8) 46th

[*11] See Johann Ludwig Klüber, European International Law, Vol. 1. (Stuttgart: Cotta, 1821) 60th

[*12] Paris Peace on the termination of the Crimean war, 30.03.1856, printed Wilhelm G. Grewe, Fontes Historiae Gentium, Vol 3/1 (Berlin / New York: Walter de Gruyter, 1992) 19, Art. 7.

[*13] GM resolution 1514 (XV).

[*14] See. The speech by President Mandela on 3 October 1994, the United Nations General Assembly, link

[*15] Printed 2 at Wilhelm G. Grewe, Fontes Historiae Iuris Gentium, Vol. (Berlin / New York: Walter de Gruyter, 1988) 183 and 188.

[*16] This instrument was certainly never been used, see. Walnut (Fn. 8) 130th

[*17] Wiener Congress file printed by Grewe (Fn 12). 3.

[*18] From 20/11/1815, ibid. 100.

[*19] These Hermann Mosler, The Great Power in International Law (Heidelberg: Lambert Schneider, 1949).

[*20] From 26.02.1885, reprinted in Wilhelm G. Grewe, Fontes Historiae Juris Gentium, Vol 3/1 (Berlin / New York: Walter de Gruyter, 1992) 297th

[*21] Printed in Grewe, ibid., Vol 3/2 (1992) 683rd

[*22] Treaties of St. Germain (Austria), Neuilly (Bulgaria), Trianon (Hungary), Sèvres (Turkey), ibid., 701-718.

[*23] *ibid* ., 810.

[*24] Leipzig: Hirschfeld.

[*25] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accor dance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), October 24, 1970 principle. 3

[*26] To Isabelle Ley, opposition in International Law (Heidelberg et al .: Springer, 2014) two hundred and first

[*27] The thesis of Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (Oxford: Oxford University Press, 2010), that States would consider international law only as a collection of non-binding policy rules, is widely exaggerated.

[*28] For the ambivalent attitude of Russia s. Lauri Mälksoo, Russian Approaches to International Law (Oxford: Oxford University Press, 2015). A review desch inese Journal of International Law shows that there highest government officials be used consistently for the respect for international law in its present form, see. about Deming Huang, Yuan Kong and Hua Zhang, 'Symposium on China's Peaceful Development and International Law', 5 Chinese Journal of International Law (2006) 261, 262nd

[*29] GM Resolution 56/83, 12.12.2001.

[*30] James Crawford, 'State Responsibility', in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, Vol IX. (Oxford: Oxford University Press, 2012) 517, 532, called the Articles of the ILC draft "part of the fabric of general international law ".

[*31] See in particular the rules on countermeasures to James Crawford, The International Law Commission's Articles on State Responsibility. (Cambridge: Cambridge University Press, 2002) 47-56.

[*32] Award of 12 July 2016, PCA Case No. 2013-19, Republic of the Philippines v. People's Republic of China,link ,

[*33] The contract has already 136 Parties and entered into force on 4 November 2016th

[*34] Christopher Clark, The Sleepwalkers (Munich: German publishing house, 2013).

[*35] 38,505 cases, s. European Court of Human Rights, Annual Report 2016, the 193rd

[*36] The starting point was the case Hirst v. United Kingdom (No. 2), Application no. 74025/01, 06.10.2005. Confirmation of the Court Hirst in Greens and MT v. United KIngdom, Application no. 60041/08,

23.11.2010, and Firth and Others v. United Kingdom, Application no. 47784/09, 08.12.2014. See also the judgment of the Russian Constitutional Court of 19 April 2016, no. 12-P / 2016, on the judgment of the European Court of Human Rights in Anchugov and Gladkov.

[*37] Russian Constitutional Court, 07.14.2015, partially played, Matthias Hartwig, 'From Dialogue to dispute? Constitutional Law vs. European Convention on Human Rights - The case of the Russian Federation ', 44Europäische Fundamental Rights Magazine (2017) 1; 5.

[*38] Act of 12/14/2015, ibid., P 8, the negative of the Venice Commission of the Council of Europe opinion, no. 832/2015, 06.13.2016, Doc. CDL-AD (2016) 016th

[*39] *Yukos v. Russian Federation*, Application no. 14902/04, 31.7.2014.

[*40] By judgment of 19.01.2017 the Russian Constitutional Court ruled that the verdict in Russia is unenforceable: link

[*41] See. In particular the judgment Görgülü the Federal Constitutional Court, 14.10.2004, BVerfGE 111, 307, 319. The judgment of the Italian Constitutional Court no. 238 of 10/22/2014, which the award of the International Court of Justice in the matter of Germany v Italy, judgment of 3.2. 2012, ICJ Reports 2012, 99, the liability in Italy refused must be rather called a random related accident.

[*42] See. In particular the 2005 World Summit Outcome, GV-Resolution 60/1, 16.9.2005, para. 121st

[*43] According to Christian Tomuschat, Human Rights - Between Idealism and Realism, 3rd edition (Oxford: Oxford University Press, 2014). 4.

[*44] GM resolution 60/251, 15.3.2006.

[*45] See. The Declaration on Territorial Asylum, GA Resolution 2312 (XXII), 14.12.1967 as well as the recently adopted New York Declaration on Refugees and Migrants, GV-Resolution 71/1, 19.9.2016.

[*46] To the idea of concrete utopia see. Karl Mannheim, Ideology and Utopia, 9th ed. (Frankfurt: Vittorio Klostermann, 2015) 169-184. Ernst Bloch has repeatedly emphasized in his work the need for "concrete" utopia, see. about: 'Resistance and Peace', in: Political measurements plague, Vormärz [. works, Complete Edition, Vol 11] (Frankfurt / Main: Suhrkamp, 1970) 375 457.

Members of the Supervisory Board of Limited Companies in Estonia: The First Cases from the Supreme Court of Estonia

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Abstract

Similarly to German law, Estonian company law Provides two-tier management for all public limited companies. Legal regulation of the liability of members of the management board and supervisory board is the same, and THEREFORE the question Arises of Whether there is any difference in liability between members of different boards. The Estonian Supreme Court recently made two decisions Regarding the liability of members of the supervisory board. The main research question of the article is 'what is the scope of the duties of the supervisory board in comparison to the duties of the management board, and how does the difference in duties affect the liability?' As the main task of the supervisory board is to exercise supervision, the question is what the actual standard of supervision is.

Keywords: director liability; supervisory board; one- and two-tier system; Estonian Commercial Code; German Stock Corporation Act; company law; Corporate Law; corporate governance

1. Introduction

Every limited company[*1]as a legal person needs special bodies to express its will and carry out its activities.[*2]Though modern company law in all countries Provides special bodies to represent and manage the company, the technical structure of thesis organs Varies Widely.

In general, two different Approaches are recognizable: Either the company has a single body with several members, who exercise separate functions, or there are two different bodies with separated functions.[*3]The so-called prototype for the one-tier system is the Anglo-American public limited company. Article 154 of the United Kingdom's Companies Act 2006[*4]stipulates did a private company must have at least one director and a public company must have at least two directors. HOWEVER, in legal literature it has been ARGUED that, due to flexible legal regulation, British companies can have different types of managing bodies, as the Shareholders have the Possibility to shape the management system as they like.[*5]

The classic examples of a two-tier management model are Germany and the Netherlands. As Compared to the one-tier system, the two-tier model is a more recent phenomenon. The concept of a two-tier model is based on the idea of an independent supervision, Which bedeutet, dass the control over the management must be Carried Out By An independent and objective body did must be separated from the everyday management.[*6]The managing bodies of the German public limited company (Aktiengesellschaft) are the management board (board of directors) and supervisory board (Board), Both of Which must be appointed by the founders of the company.[*7]The everyday activities are Carried out by the management board, and the task of the supervisory board is to control the activities of the management board in general. German private limited companies (limited liability company) normally have one-tier management structure,[*8th]but some special regulations deriving from co-determination rules can make the supervisory board compulsory therefore for smaller companies.[*9]

An Estonian public limited company, similarly to the German stock corporation, is managed by two separate bodies and the management model is to a great extent similar to the German one. .According to Art. 243 (1) p 7 and Art. 316 of the Estonian Commercial Code[*10], Every public limited company must have a supervisory board. .According to Art. 189 of the CC, a private limited company shall have a supervisory board if it is provided by the articles of association of the company. As Estonian law does not foresee any co-determination rules, the formation of a supervisory board is voluntary for all private limited companies.[*11]In case Shareholders decide to choose the two-tier model, the provisions of the CC Concerning the supervisory board of a public

company apply correspondingly to the powers and activities of the supervisory board unless otherwise provided by law.

Though Estonian case law has had many examples of claims filed against the members of the management board, Estonian courts have only lately started solving cases where the members of the supervisory board have been sued for damaging the company. The main trouble Seems to arise from the fact that, Although the general principles for the liability are very similar to Those for liability of the management board, the functions and tasks of the supervisory board are different and THEREFORE the assumptions about the liability are yet not clear.

The article addresses the core question of the scope of the powers and obligations of the members of an Estonian public limited company's supervisory board. The main research question is: Whether and to what extent the relevant Estonian case law takes into account the special features Of Those obligations. The purpose of the research is to compare Estonian legal regulation and case law to the relevant German regulations. The above-Mentioned approach is justified Because The German public limited company, as well as its Estonian counterpart, has a two-tier management model.[* 12]

2. Functions and powers of the supervisory board: A comparative view

2.1. General duties of the supervisory board

.According to law, the supervisory board of Estonian companies has three major functions: general management of the company, planning of the economic activities of the company, and supervision of the activities of the management board. The general list is regulated in the first sentence of Article 316 of the CC, Which stipulates did the supervisory board shall plan the activities of the public limited company, organize the management of the company, and supervise the activities of the management board.

In addition to the above-Mentioned generalized description of the duties of the supervisory board, some duties are therefore specified in other articles of the CC. The duty of the strategic general management[* 13]Arises from Article 317 of the CC, and as far as the Shareholders have not determined the main directions of the activities With Their decisions, it is the power of the supervisory board to conduct the general management. .According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organization of the management of the company. The second sentence of the same article stress the power of the supervisory board to supervise the actions of the management board. .According to this provision, all transactions did are beyond the scope of everyday economic activities, as

a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions did bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of Subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note did the list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not.[* 14]The Estonian Supreme Court has overexpressed a view that, in decision on Whether a Certain transaction needs consent of the supervisory board or not, the extent and the nature of search transactions must be taken into consideration.[* 15]

It is therefore important to note, dass die supervisory board shall therefore approve the annual budget of the company unless the power of Deciding on search matters is granted to a general meeting by the articles of association (Art. 317 (7)).

HOWEVER, the meaning and content of the duty to supervise and monitor the actions of the management board is not CLEARLY stipulated in law. Art. 317 (7) CC foresees did the supervisory board has the right to obtain information Concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law thus foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has therefore been Described in Estonian legal literature: it has neither the competence nor the Possibility of suspending the activities of the management board.[* 16]

In addition to that, Art. 317 (6) of the CC stipulates did the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activities of the company with the law,

the articles of association, and resolutions of the general meeting. HOWEVER, the law does not include the clear standard of supervision. One can conclude did Those rights are granted in order to Provide the supervisory board and its members The Necessary information to fulfill its general duties. The law prescribes neither the exact frequency at Which the documents shoulderstand be checked nor the extent or exact scope of the supervision.

Unlike the management board, being a body did carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. .According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held When Necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been Considered Mainly as a controlling body - Art. 111 (1) of the German Stock Corporation Act stipulates did a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too. . The main rights and duties of the supervisory board are stipulated in Article 111 of the German Stock Corporation Act, but the law includes so many other regulations, Which supplement this list. For Example, to Art. Gemäß 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). .According to Art. 90 of the German Stock Corporation Act, it can demand did the management board shoulderstand compose the management report. .According to Art.

Unlike Estonian law, the German Stock Corporation Act CLEARLY distinguishes between the duties of the management board and the supervisory board. Art. 111 (4) of the German Stock Corporation Act stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been overexpressed in German legal literature did the clear distinction and to organizational differentiation between the competence to take decisions as regards everyday actions and to supervise Those actions derives from the idea did each of the bodies acts unabhängig and is separately responsible for fulfilling its obligations.[*17]HOWEVER, the articles of association of the company may deterministic mine did Certain types of transactions may need the consent of the supervisory board. This is Considered as a Possibility for the supervisory board to participate in managing the company and THEREFORE Directly affect the management decisions (in addition to the Possibility of advising the management board).[*18]Under German law, it is the supervisory board as a body (a collective

entity) did performs the functions and carries the responsibility foreseen in law and not its single members. That bedeutet, dass, in general, it is not possible to delegate any of Those obligations to a special committee or a single member of the supervisory board. HOWEVER, it is possible for some actual monitoring activities to be Carried out by special committees of the supervisory board.[* 19]

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been Discussed. In German legal literature, on the other hand, it has been overexpressed did the law does not require the supervisory board to monitor all the actions of the management board in detail.[* 20]The supervision is Considered Sufficient and reasonable When the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the Developments and business events did are disc losed by the management board;
- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;
- is Convinced did the management board is properly composed and its members are Appropriate for fulfilling Their obligations;
- is Convinced did the members of the management board co-operate properly and did all the management tools, (ie, business planning, accounting, and reporting), as well as the company's organization, meet the requirements;
- Ensures did the management board fully Complies with its reporting obligation Pursuant to Article 90 of the German Stock Corporation Act;.[* 21]
- is able to trace all the indications did might lead the management board to a violation of its duties;
- in any case of significant Deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material Deviations as regards Those indicators in Comparable companies, examines Whether Those Deviations are justified and Whether the management board Responds perform adequately.[* 22]

Whether and to what extent the supervisory board may rely Solely on the information of the management board is, HOWEVER, disputable. There are different opinions in German legal literature about the question of Whether monitoring actions of the supervisory board Should be extended to subordinate levels where the management decisions are taken.[* 23]Some authors are of the opinion did Sufficient

monitoring Means, in general, did the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board. [24]Some authors explain, dass die supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. HOWEVER, it has been stressed, dass die supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.[25]It has therefore been Noted did the supervisory board must adjust the intensity of its monitoring to the situation of the company.[26]The supervisory board has an obligation to interfere, Which bedeutet, dass if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the Appropriate evidence must Ensure did the supervisory board or the responsible person deals with the matter.[27]

It has been overexpressed did When the company is in crisis, so but in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more Actively.[28]In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must Ensure the existence of adequate organization of the reporting system and intensify the monitoring When Particular circumstances arise - For Example, if there are any indications did the existence of the company is threatened.[29]After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and must file for bankruptcy. Has the supervisory board discovered did the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is Considered to be liable for breaching its duties alongside the management board.[30]

The law does not Provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been overexpressed in legal literature did all transactions did Considered are particularly important still need the supervisory board's approval.[31]

.According to German legal literature, in case of upcoming decision of a supervisory board can be Considered unjustifiable and unacceptable,

any diligent member of a supervisory board is not only obliged to vote against it but so has an obligation to Explicitly reject the decision and point out reservations, DEPENDING on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.[* 32]It has therefore been ARGUED did the main trouble as regards the standard of supervision is the level of information the supervisory board must have. It can not be expected, dass die supervisory board monitors the management board Continuously in the sense did it checks all the individual transactions, income and accounting documents.[* 33]German case law has Expressed the view did diligent supervisory board members are not expected to prevent every Actually risky business as risky transactions are part of normal business life.[* 34]

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and accor ding to this commission the members of the supervisory board who cause damage to the company by violation of Their obligations shall be jointly and severally liable for compensation for the damage caused. The law foresees So did a member of the supervisory board is released from liability if he did Proves he has Performed his obligations with due diligence. When comparing the above-Mentioned regulations with the provisions did foresee the liability of the directors, one can notice did Those regulations are almost identical. In Estonian legal literature,[* 35]This raises the question of how one can distinguish the liability of the supervisory board from the liability of the directors and Whether it is enough to ascertain did the directors have breached Their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German stock corporation are very similar to the regulations of the Estonian CC. Article 116 (1) of the German Stock Corporation Act stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the German Stock Corporation Act, Which Regulates the duty of care and the liability of the management board, Applies mutatis mutandis.[* 36]The law emphasises did the members of the supervisory board are, in Particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law thus stipulates did the members of the management board are, in Particular, obliged to compensate for the damage did Arises from unreasonable remuneration.

In German legal literature, it has thus been explained 'that, though the provisions did regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are silent lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'Appropriate' application Of Those regulations.[* 37]

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a Necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be Caused by the breach of obligations of the member of the supervisory board. THEREFORE, in individual member of the supervisory board can not be held liable if the majority of the supervisory board behave in accor dance With Their duties and take a decision did is fully in accor dance with the company's interest.[* 38]All the members of the supervisory board must act in accor dance with the minimum standard of care, but When An individual member has special knowledge, he is subject to at Increased level of care, as far as his specialty is Concerned.[* 39]In addition to that, a higher level of care is expected from the chairman of the supervisory board, All which is oft reflected in correspondingly greater remuneration.[* 40]

It can be Concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in respect did. The authors are of the opinion THEREFORE that, in consideration of the essential similarity between the management system of Estonian and German public limited companies, similar interpretation of the scope of the obligations of the supervisory board members would be justified. It is important to note did Estonian legal practice shoulderstand definitely avoid setting Significantly higher standards When interpreting the scope of Those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyzes the powers and duties of the members of the supervisory board, a question Arises: what might be the specific cases When the members of the supervisory board can be held liable for Causing damage to the company? Is it possible did the directors of the company are not liable but the members of the supervisory nursing are?

German case law knows several examples of situations worin the members of the supervisory board have been held liable for the damage

caused to the company. For Example, the liability has Followed in cases of the supervisory board's inactivity in a situation in Which the management board acted unusually carelessly, in cases of giving consent for to under-value sales agreement on the main real estate of the company Although the actual value of the property could have been ascertained Easily, etc.[* 41]

German case law is therefore of the opinion 'that' in the case of transactions did are of Particular importance to the company Because of Their scope, the risks associated with them, or Their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgment. This therefore includes a regular risk analysis.[* 42]

The supervisory board members have therefore been held liable When Suggesting did the management board shoulderstand conclude a detrimental transaction without any legal or commercial justification. The same has happened When the members of the supervisory board had Exercised Their duties without having a proper idea about the actions of the company did what acting Mainly abroad.[* 43]

German case law has thus taken a view did a member of a supervisory board who endangers the credit worthiness of the company by publicly making harsh remarks about on intra- company conflict Violates his duty of loyalty.[* 44]

The foregoing analysis shows did German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, HOWEVER, the issues related to the liability of the supervisory board are silent Relatively new.

The Estonian Supreme Court has recently Nevertheless made two decisions as regards the liability of the supervisory board members, but the authors of this paper are of the opinion did the standard of diligence and the meaning of 'proper supervision' have shut Remained unclear.

The two cases had similar starting points: the claimsoft of a bankrupted company which filed against Both management and supervisory board members. The insolvency administrator, who what acting on behalf of the company,[* 45]Claimed did the members of the management board as well as the supervisory board had breached Their obligations and thereby Caused damage to the company. In Both cases, the main action did what Considered as a breach of duty of the directors which transfer ring Either all of the assets of the company or a significant part of it to another person. Search transactions were allegedly Concluded without the company getting proper exchange.

In the first of the above-Mentioned cases,[* 46]the insolvency administrator alleged did the director and three members of the supervisory board had breached Their obligations and did this breach had

resulted in three kinds of damage: the company lost, Firstly, its cash; secondly, the main property; and, Thirdly, the turnover. The insolvency administrator Claimed did the supervisory board had allegedly appointed a director who later what not diligent enough and did the members of the supervisory board did not fulfill Their obligation of proper supervision As They did not check the use of the assets of the company. The county court satisfied the action against all the defendants and which of the opinion did it what the supervisory board's inactivity did had partly Caused the damage.[*47]At the appeal court, the action Remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained 'did the functions of management and supervisory boards are different: as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court Expressed the view that, Although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable.[*48]

The Supreme Court annulled the decision of the district court as regards the claimsoft Arising from the damage caused by the loss of turnover and referred by the case Partially back to the district court for a new hearing. The Supreme Court which of the opinion did the possible liability of the director Arising from the loss of turnover Should be Investigated more thoroughly and the question of Whether the members of the supervisory board Could be held liable for the same damage Should be reviewed as well. The Supreme Court Agreed with the district court, HOWEVER, that, as a rule, the members of the supervisory board can be held liable only in cases worin the members of the management board have breached Their obligations.[*49]Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. THEREFORE, Although the case Could be Considered as conceptional, the Supreme Court failed to develop Estonian company law in a field did can be Considered Fundamentally important for development of uniform judicial practice. One can only conclude did if the management board's behavior does not cause damage to the company, the liability of the supervisory board is

therefore out of the question, Regardless of Whether the members of the supervisory board have been acting diligently or not.

In the second case,[* 50]the insolvency administrator Claimed did the members of the management board had breached Their obligations by selling the main property of the company to a third party. The sales agreement stipulated did the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator which of the opinion did search actions were not in accor dance with the business judgment rule and did the transaction what Economically unjustified. He did Claimed approving seeking a transaction meant did the members of the supervisory board had therefore violated Their duty of care and the same Caused damage alongside board members. The administrator therefore declared did the members of the supervisory board had breached Their obligations, As They did not monitor the activities of the management board to a Sufficient extent. Had They Fulfilled Their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been Prevented. The members of the supervisory board ARGUED thatthey Could not be held liable for the actions of the management board as They had no knowledge of the allegedly harmful transaction and did the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained did the supervisory board as a body had never taken any decision as regards Those questionable transactions. The Supreme Court explained 'that, as the supervisory board had never passed a resolution approving the harmful transaction, it Actually never Directly DECIDED to conclude it.[* 51]The Supreme Court Nevertheless emphasised did individual members of the supervisory board Could quietly have breached Their duties If They knew did the management board what about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (Either through the Directly or chairman).[* 52]

The Supreme Court therefore stressed did the members of the supervisory board Could not be held liable only Because theywere aware of the harmful transaction did the members of the management board had Concluded. The Supreme Court annulled the decision of the appeal instance and referred by the case back to the district court for a new hearing. The Supreme Court Instructed the district court did on the new hearing, it shoulderstand ascertain Whether the defendants had had the Possibility of taking steps to prevent the damaging transaction being Concluded and did If They had had the Possibility of Avoiding the damage, They Should be held liable for the Consequences.[* 53]

The Supreme Court justified the annulment of the decision of the court of appeal with the factthat the appeal court allegedly failed to consider Whether the defendant as a member of the supervisory board which aware of the harmful nature of the transaction. The Supreme Court therefore Noted did if he had had the above-Mentioned knowledge, he shouldhave Exercised the supervision more diligently.

In general, this approach can be Considered justified, but the authors of the article are of the opinion did the above-Mentioned reasoning of the Supreme Court and the instructions given to the court of appeal for a new hearing seem to be contradictory. On the one hand, the Supreme Court Explains did no member of a supervisory board can be held liable only on the basis of an accusation did he hasnt provided enough supervision of the actions of the management board. On the other hand, the Supreme Court orders the court of appeal to ascertain Whether the members of the supervisory board Could have Prevented the harmful actions (meaning Whether They had provided enough supervision).

The authors of the article note did in assessment of breach by Both management and supervisory board members, the main principle is did one can not conclude did a director or a member of the supervisory board breached his obligations only Because The outcome could adversely. Any court decision must include the Explanations Of Those differences, and if the court finds did a director has breached his duties, the court shoulderstand explain how the defendant shouldhave been acting instead.[*54]The question has a member of a supervisory board Fulfilled his obligations or violated them can not be perform adequately Assessed by looking for an answer to the abstract question of Whether the supervision what Sufficient. Although the case is pending silent, the Supreme Court shouldhave given some guidelines to the district court as regards the application of business judgment rule When Establishing the liability of the supervisory board members. When assesing the fulfillment of the obligations and Establishing the infringement by the members of the supervisory board, one must compare the standard of action (ie, what the members of the supervisory board shouldhave done) to the actual steps taken (ie, What They Actually did).[*55]

The authors of the article are of the opinion that 'insufficient supervision' itself is not a breach of duties. The actual breach That should be Assessed in discussion of the Possibility of holding the supervisory board liable is an improper action taken by the supervisory board, or inactivity When it shouldhave acted instead. The breach of one's duties can be Considered as a 'performance gap', and it can only be ascertained via comparing the actions taken to thosethat shouldhave been

taken. The main principle about the liability of the members of the supervisory board can not be ascertained Significantly differently from did about the liability of the directors.

4. Conclusions

The authors are of the opinion did neither Of Those two decisions of the Supreme Court as a matter of fact answers to the question, what is the actual liability standard of a member of a supervisory board. Both decisions lack the proper application of the business judgment rule, and this approach contradicts the previous approach the Supreme Court has taken When assesing breach of duties of the directors. It is important to note, dass die breach of duties by a member of a supervisory board as well as by a director can be established only by comparing the bond with the actual behavior of the person in question. The above-Mentioned decisions might give the false impression THEREFORE did the factthat a director has breached his obligations Means automatically did the members of a supervisory board must have therefore breached Their obligations, as obviously the supervision hasnt been Sufficient. This conclusion is unjustifiable HOWEVER - the breach of the obligations of the management board can not be Considered as the only prerequisite of the liability of the supervisory board.

The analysis therefore Showed did the powers and obligations of the supervisory board of Estonian and German public limited companies are quite similar and THEREFORE it would be reasonable to take the view points overexpressed in German legal literature and case law at least, as a general Example When interpreting Estonian legal regulations. One can conclude THEREFORE did the breach of duties of the supervisory board must be Assessed separately, with application of the business judgment rule similarly to 'that' in the situation worin breach of duties of the directors is Assessed. The law does not require the supervisory board to monitor all the actions of the management board in detail, and the standard of supervision depends heavily on the circumstances. In the case of the directors of the company having breached Their duties,

Notes:

[*1] In Estonia, similarly to other EU member states, there are two types of limited-liability companies: public limited company (aktsiaselts) and private limited company (osaühing). See also: M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company'], master's thesis. Tartu 2006, p. 7th

[*2] About the legal theories of a legal person, lake, For Example, K. Saare.Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine

(delimitation of the legal personality of the private legal Legal Person) [in English: Delimitation of the legal subjectivity of the private legal person], doctoral thesis , Tartu of 2004.

[*3] So there are some countries within Europe did allow public limited companies to choose between the two models (eg, France and Belgium). M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company], master's thesis. Tartu 2006, pp. 28, 37, 97- 98th

[*4] UK Companies Act 2006. Available at link

[*5] J. Rickford. Fundamentals, Developments and trends in British company law - some reflections resist. First part: Overview and the British approach. - European Company and Financial Law Review 1 (2004) / 4 (December), p. 405th

[*6] AF Conard. The supervision of corporate management: A comparison of Developments in European Community and United States law. - Michigan Law Review 82 (1984), pp. 1459-1488.

[*7] See Article 30 of the Stock Corporation Act (AktG;... Share of 6 September 1965 (Federal Law Gazette I p 1089), which (under Article 8 of the Law of 11 April 2017 I, p 802) has been changed Available at. link).

[*8th] See Article 52 of the German Law on Limited Liability Companies Limited Liability Companies Act (GmbHG;. Law on limited liability companies in the Federal Law Gazette Part III, classification number 4123-1, revised version published, most recently by Article 8 of the Law of 10 has been amended in May 2016 (Federal Law Gazette I, p. 1142)).

[*9] H. Fleischer, W. Goette (ed.). Munich commentary on Limited Liability Companies Act. Verlag CH Beck Munich. 2nd edition 2016 - Spindler § 52, para. 14th

[*10] Commercial Code. Adopted on 15 February 1995. - RT I 1995, 26/28, 355; RT I 22.06.2016 (in Estonian). Come After 'CC'.

[*11] Until June 1996, Art. 189 (1) of the CC stipulated did a supervisory board is compulsory for every private limited company did has share capital did Exceeds 400,000 kroons, more than 20 Shareholders, or more than 100 employees during at accounting year. Until 1 January 2011, a supervisory board which compulsory for every private limited company with share capital of more than 25,000 euros and with fewer than three members of the management board.

[*12] The use of German law as a source for comparison can therefore be justified by the view, Expressed by the Supreme Court of Estonia, did on many occasions the German legal system serves as a model not only for legal regulations but then, as An example for courts for the interpretation of the relevant law. See CCSCd 3-2-1-145- 04, para. 39th

[*13] About the strategic management, maritime additionally K. Saare, U. Volens, A. Vutt, M. Vutt. Ühinguõigus I. Kapitaliühingud ['Company Law I: Limited Companies']. Tallinn: Juura 2015 mn. 1846th

[*14] .According to Art. 317 (2), the articles of association may, HOWEVER, prescribe did the consent of the supervisory board shall not be required or is required only in the cases specified in the articles. The articles of association may therefore prescribe other transactions for the conclusion of Which the consent of the supervisory board is required. The articles of association may therefore grant the supervisory board the right to decide on other issues did not are Placed within the competence of the management board or the general meeting Pursuant to law or the articles of association.

[*15] CCSCd 3-2-1-9-16, para. 36; CCSCd 3-2-1-26-17, para. 13th

[*16] K. Saare et al. (Note 13), mn. 1864th

[*17] W. Goette, M. Haber bag, pp Kalss. Munich Commentary on the Act. Verlag CH Beck Munich. 4th Edition 2014. - Habersack, AktG § 111 para. 96th

[*18] *ibid* , Rn. 96th

[*19] *ibid* , Rn. 49th

[*20] W. Hölters (ed). Stock Corporation Act. Comment. Verlag CH Beck Munich. 2nd edition 2014 - Hambloch-Gesinn / Gesinn, para. 11

[*21] Art. 90 of the Stock Corporation Act stipulates the list of different reports the management board is obliged to present to the supervisory board. They include eg reports about the Intended business policy of the company, fundamental questions of business planning (in Particular financial, investment and personnel planning), profitability of the company (in Particular the profitability of its equity), the course of business, the situation of the company as a whole, and transactions Which can be of Considerable importance for the profitability or liquidity of the company.

[*22] W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

[*23] U. Hüffer, J. Koch. Beck'scher short comments. Band 53. Stock Corporation Act. CH Beck Munich, 12th Edition, 2016. - Koch, § 111, Rn. 4

[*24] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

[*25] W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

[*26] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

[*27] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 33rd

[*28] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 Rn 37th

[*29] U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 15th

[*30] BGH: validity of the payment ban from entering the insolvent. - NZG 2009, 550 BGH, judgment of 16. 3. 2009 - II ZR 280/07 (OLG Dresden).

[*31] U. Hüffer. Corporate Law. 7th edition. CH Beck 2007 S 285; U. Hüffer, J. Koch (Note 23). - Hüffer, cooking, § 111, Rn 45th

[*32] M. Henssler. L. Strohn. Corporate Law. Beck's brief comments. 3. Edition. Verlag CH Beck, Munich 2016 - Henssler AktG § 116 para. 11th

[*33] Reichard: burden of proof in damages trial of the Supervisory Board. Stuttgart Higher Regional Court, decision of 19.06.2012 - 20 W 1/12, legally (LG Tübingen), BeckRS 2012 14126. - GWR 2012 491st

[*34] BGH: Liability of a Director in a mass society. - NJW 1977, 2312. BGH, judgment of 4 7. 1977 - II ZR 150/75.

[*35] K. Saare et al. (Note 13), mn. 1886-1890.

[*36] The only exception is did the regulations about the insurance of the management board members against risks Arising From Their professional activities do not apply.

[*37] U. Hüffer, J. Koch (Note 23). - Hüffer, § 116, para. 1

[*38] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 29th

[*39] BGH: Liability of management and supervisory board of a public company. - CCZ 2012, 76. BGH, judgment of 20. 9. 2011 - II ZR 234/09.

[*40] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 37th

[*41] U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

[*42] D. Lorenz: Duty to separate risk analysis for supervisory board members - Piëch. - GWR 2012, 156. Stuttgart Higher Regional Court, judgment of 29.02.2012 - 20 U 03/11 (LG Stuttgart).

[*43] This decision is, HOWEVER, Considered problematic. See U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

[*44] D. Lorenz (Note 42).

[*45] .According to Art. 315 (4) and Art. 327 (4), in the case of declaration of bankruptcy of a company, only to insolvency administrator has a right to file a claim on behalf of the company.

[*46] CCSC 3-2-1-113-16.

[*47] CCSC 3-2-1-113-16, para. 6th

[*48] CCSC 3-2-1-113-16, para. 9th

[*49] CCSC 3-2-1-113-16, para. 25th

[*50] CCSCd 3-2-1-152-16.

[*51] CCSCd 3-2-1-152-16, para. 17th

[*52].According to Art. 321 (1) of the CC, a meeting of the supervisory board shall be called by the chairman of the supervisory board or by a member of the supervisory board Substituting for the chairman.

[*53]CCSCd 3-2-1-152-16, para. 19th

[*54]. The general obligation of proper reasoning for the court decision derives from Art 436 (1) of the Estonian Code of Civil Procedure (Code of Civil Procedure, ADOPTED on 04.20.2005 - RT I 2005, 26, 197;. RT I, 28.12 .2016), Which stipulates did a court judgment shall be lawful and reasoned. The requirement of reasoning bedeutet, dass the judicial reasoning must be understandable, traceable, and associated with the circumstances thathave been Identified by the court in this specific matter. This specific procedural requirement of judicial decisions as a prerogative of a lawful court decision has been several times overexpressed in Estonian case law: see, for instance, CCSCd 3-2-1-13-17, para. 15; CCSCd 3-2-1-42-16, para. 13-15; CCSCr 3-2-1-70-15, para. 20; CCSCd 3-2-1-129-15, para. 15, etc.

[*55]The same principle is applicable in assessment of breach of duties of the member of the management board (see CCSCd 3-2-1-129-15, para. 15).

Legal Arrangements Similar to trusts in Estonia under the EU's anti-money laundering Directive

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Abstract

According to EU Directive 2015/849, all Member States must establish a central register of data on ultimate beneficial owners of corporate legal entities and therefore of trusts and legal arrangements similar to trusts. First of all, this requires identification of the Latter arrangements in the individual Member States, All which is not an easy task: the definition related to being 'similar to trusts' is quite vague.

The main aim with the article what to deterministic mine the arrangements in private Estonian law That should be Considered in implementation of the UBO register rules. THEREFORE, a letter overview is provided of trusts and two types of arrangements used in civil-law system for the same purposes - the trust and fiducie. The piece then highlights the similarities between thesis and the trust, with the conclusion being drawn that being 'trust-like' in the context of the directive boils down to situations worin from the outside the property has one person as an owner but there thus exists to internal relationship did obliges the title-holder to observe Certain duties and did may grant another person the economic benefit from the property.

Next, the article turns to the Estonian legal scene. Under consideration are family- and succession-law devices (eg, executorship of a will), various forms of shared ownership and communities (in Particular, silent partnership and contractual investment funds), mandates and

commission contracts, intermediated holding of securities, fiduciary and ownership for security purposes. The conclusion is thatthere are indeed arrangements in the Estonian legal system did fall into the category of trust-like arrangements under the directive but did the registration of UBO data for all of them would not be without difficulties. Finally, some criteria for registration of the relevant arrangements are Proposed.

Keywords: anti-money-laundering directive; ultimate beneficial owners; UBO register; trusts; arrangements similar to trusts; civil law; mandates; silent partnership; contractual investment funds

1. Introduction

To identify terrorists and money launderers-hiding behind legal entities or arrangements, EU Directive 2015/849[*1](4AMLD) Introduced the 'UBO register'. In consequence, all Member States (MSs) have to establish a central register Containing data on ultimate beneficial owners (UBOS)[*2]of corporate legal entities and therefore of trusts and legal arrangements similar to trusts (in after 'SAs').

HOWEVER, before 4AMLD what transposed into the national law of the various MSs amend ments to it - referred by to by the name '5AMLD' and begun with the European Commission's' Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Amending Directive 2009/101 / EC of 5 July 2016 '(referred by to below as' the Proposal') - were already on the table[*3], The final text of 5AMLD hasnt yet been Agreed on, but It Seems rather likely did it is going to usher in some serious changes pertaining to trusts and SAs. Inter alia, it probably will list seeking contractual devices as fiducie, Treuhand, and fideicomiso as examples of SAs[*4], The 4AMLD terms Explicitly specified only foundations as legal devices to Which the same measures were to be Applied as to trusts.[*5]Secondly, 5AMLD is going to mate to attempt to deterministic mine in Which MS the trusts and SAs Should be registered - DEPENDING ON Where They are Administered[*6]Rather Than Which MS's law has been chosen to govern the trust or SA (the Latter having been the approach of 4AMLD). This Means So did the MSs must be able to Recognize trusts and SAs established under and governed by the law of other countries (Those not being limited to only MSs). Thirdly, the circle of persons to whom the data of UBOS will be available will most probably broaden. .According to 4AMLD, the information Concerning UBOS of trusts and SAs what already to be made Directly accessible to Competent Authorities and financial

intelligence units (FIUs)[* 7], The initial proposal for 5AMLD suggested Allowing public access to the data on Those trusts and SAs did are 'business-type' and / or Administered by professionals and granting it to Those persons 'with legitimate interest' in the case of others.[*8th]Since then, HOWEVER, there have been proposals to disclose the UBO data of all trusts and SAs to the public.[* 9]

The MSs are expected to identify SAs used in Their countries and to assure the submission of the data of related UBOS to a central database.[* 10]It Seems that, at the moment, Estonia has chosen to take the approach that, apart from foundations, there are no devices similar to trusts in our legal practice That should be subject to UBO-register rules.[* 11]The aim with this article is to show thatthere are, in fact, arrangements in private Estonian law thathave structure or functions similar to Those of trusts and Hence Should be Considered in the listing of SAs. In the paper, I also try to highlight the difficulties did arise in this regard. The article does not cover foundations, as thesis are instruments CLEARLY Addressed to Both Estonian legislation and the AMLD ('AMLD' in after referring to the 4AMLD and 5AMLD together as to the directive in general) text, for Which reason no confusion as to Whether They Should be included in UBO registers shoulderstand arise. For similar reasons, it does not cover corporate legal entities.

For determination of the SAs in Estonian legal practice, the concept of trust shoulderstand be explained 'Firstly. The 4AMLD and 5AMLD texts do not give a definition of trust. Instead, Both equate it with instruments used in civil-law systems thathave similar structure or functions. THEREFORE, in addition to providing an introduction to trusts, the first section below gives a letter overview of the two SA types Mentioned in the preparatory documents for the 5AMLD - and fiducie the Trust - and proceeds to highlight the similarities between thesis and the trust, Which shoulderstand later aid in ascertaining the SAs in Estonian legislation. Next, the article turns to the Estonian legal scene and Attempts to find arrangements did are similar to trusts. Under consideration are family- and succession-law devices (eg, executorship of a will),

2. Trusts and SAs under the directive

2.1. trusts

Purposes. The institution of the trust has developed Mainly in jurisdictions based on the English legal system. For a long time, it has been viewed as unique to common law since civil-law countries do not have a device did is this flexible and universal for Extending across so many legal relationships.

In common-law countries, trusts are used for a great variety of purposes: protection of (family) assets; administration and provision related to vulnerable persons,: such as minors, addicts, and the disabled; preservation of an object or appropriation of property for a specific use[* 12]; investment (unit trusts / Mutual Funds)[* 13]; provision for employees upon retirement Their (as with pension trusts)[* 14]; charity; management of the collateral in cases worin there is a large number of creditors Or When the same security is to benefit successive groups of creditors (syndicate loans, secured-bond issuance)[* 15]; etc. testamentary trusts are created by a person's will and arise upon the death of the testator.

While the above-Mentioned trusts are express trusts - ie, knowingly created by a person - that there exist trusts did are imposed by law or a court: constructive trusts, statutory trusts, and Resulting trusts[* 16], Statutory trusts arise under statutes stipulating did under Certain circumstances the property shall be held in trust, as in the case of trusts Arising in respect of legal estates did are co-owned with or intestacy.[* 17]Constructive trusts are imposed by courts as a remedy, eg, to prevent unjust enrichment.[* 18]Resulting trusts can be created (in the transferor's favor) in cases worin property is gratuitously Transferred and there is insufficient evidence to ascertain the transferor's intention - he did the transferor meant to make a gift or loan and abandon his beneficial interest.[* 19]

Definition and parties. The Draft Common Frame of Reference (DCFR)[* 20]Defines the trust as a legal relationship in Which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accor dance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. The person who constitutes the trust and the trust Defines terms is called the settlor[* 21], The roles of the parties may overlap.[* 22]A trust is not a legal entity or a contract[* 23],

Fiduciary ownership. An essential feature of a trust is did the title[* 24]to the trust fund is vested in the trustee: 'For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner.'[* 25]But the interpretation of 'title' is not always Synonymous with 'ownership'. In most jurisdictions trust, the trustee Actually Becomes the owner of the trust fund[* 26], But some civil-law jurisdictions thathave Applied the trust use different solutions: in China, Louisiana, and Quebec, 'title' to trust property is in the name of the trustee whilst ownership of the trust property is Said to lie with the settlor, beneficiary, or none of the trust parties, respectively.[* 27]

Even if the trustee is the owner, it must be remembered did the trust assets have only been passed to him for the purposes set forth in the

trust terms. Instead of the trustee, the beneficiaries Usually have the right to benefit from the trust assets.

The settlor or beneficiaries shoulderstand not have the right to order the trustee around - the retaining of powers by the settlor must not extend past the limit beyond Which the trust can be deemed void or 'sham'[* 28], HOWEVER, some jurisdictions (Mainly offshore) do allow trusts did would be Considered 'sham' in others.

Segregation of patrimonies. With the trustee being the owner of the trust fund, he can be personally liable to satisfy trust debts (the first rule Regarding creditors silent is thatthey may satisfy Their rights out of the trust fund)[* 29], But his personal creditors shall not have recourse to the fund, as the trust fund is to be Regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.[* 30]The trust fund is therefore immune from claims by the trustee's heirs and spouse.[* 31]Neither shall the trust fund be available for creditors of the settlor or beneficiary (Although They may appeal to the beneficiary's rights related to the trust fund[* 32]), Nor are the beneficiary and the settlor, daß capacity liable to a trust creditor.[* 33]

Tracing. Another specific feature of the common law trust is the special nature of the rights of beneficiaries against third persons in the event of misappropriation of the trust assets by the trustee. Although beneficiaries are not the owners of trust assets, They Might have a claim against a third-party recipient who is not an acquirer for value in good faith.[* 34]

2.2. The similarity in SAs

The Trust. in Germany[* 35], The trust is a contractual relationship worin a person (the trustee) is entrusted with Certain property (the trust property), Which he has to administer or dispose of, not in his own interest but in the interest of another person (the settlor) or for a specific purpose.

This institution is not Explicitly regulated by law and is instead governed by academic writings and case law. Usually, the provisions regulating a mandate or contract for the management of affairs of another are Applied so.[* 36]

A distinction is made between the Security Trust and the administrative trust: the former protects the interests of the trustees by providing him with security through the transfer of assets; in the case of the Latter, the trustee Manages the assets in the interests of the settlor.[* 37]

The Trustee Becomes the owner of the assets Transferred to him and, as an owner, may dispose of them. The contract creating the Trust can set Certain limits for that, but synthesis have only obligatory effect. Hence, dispositions made in breach of obligations are examined gene

rally valid.[*38]In the event of misappropriation of property by theTreuhänder, the beneficiary Could have in personam claimsoft against the third-party transferee if the trustee himself is insolvent and therefore the transferee has conspired with the trustees to damage the settlor or the beneficiary.[*39]

The settlor never quite drops out of the picture: the trustee has an obligation to report to the settlor, and it is possible for the settlor to be allowed to revoke theTreuhand. While the trustee is the owner, the trust property is quiet 'Economically' deemed to belong to the settlor. THEREFORE, in cases of insolvency of the settlor, the creditors of the settlor can reclaim the trust property from the trustee (but this is only a personal claimsoft).[*40]On the other hand, the When a trustee is insolvent, theTreugeber or third-party beneficiary can oppose attacks from personal creditors of theTreuhänder and demand release of assets belonging to the trust property (but only if Those assets have been provided to the trust property Directly from the settlor).[*41]

The fiducie. Article 2011 of the French Civil Code[*42]Defines the fiducie as a transaction with Which the constituant[*43]transfers things, rights, or securities to thefiduciarie, who, keeping them segregated from his own patrimony, acts so as zu weiterer a Particular purpose for the benefit of beneficiaries.

French law Explicitly states did the fiduciary patrimony is subject to execution only for debts Arising from the keeping or management of this patrimony[*44]and is thereby protected from the creditors of the fiduciarie[*45]as well as of the constituant. Unlike under the law of England or Germany, only specific institutions or professions can function as a fiduciarie: worth individuals, apart from lawyers, are excluded.[*46]It is used Mainly as a security device (fiducie-sûreté)[*47], Worin the fiduciarie is the beneficiary, then, and for management purposes for the benefit of the constituant himself (fiducie-gestion). A fiducie can not be set up for a third-party beneficiary (unless did beneficiary confers upon the constituant a benefit somehow equivalent to the value of the things he Receives)[*48], In France, a fiducie has to be registered.[*49]

The common feature. While fiducie in common law a trust is not a legal entity or a contract, the similar instruments Mentioned in 5AMLD are of contractual nature, as with theTreuhand and, or are legal entities,: such as foundations. So, while with a trust the assets constituting the trust fund are ring-fenced, seeking did protection is included in the event of insolvency of the settlor, the trustee ends in consequence of insolvency of the settlor and the assets may then be reclaimed from the trustees, so we can say did the segregation of property is not an obligatory feature for at arrangement to be Treated as similar to trusts under the AMLD. The

beneficiaries' rights against third persons in cases of misappropriation of property by the trustee are gene rally stronger in the case of trusts.[*50]

This leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it, for the benefit of one or more other persons or for a specific purpose. Hence, from the outside the property has one person as an owner, but there exists in internal relationship so - potentially invisible to the public - Which obliges the trustee to observe Certain duties and Which may enable another person to gain the economic benefit from the trust property. Below, The Further examination of the possible SAs in Estonia proceeds from this conclusion.

3. Possible SAs in Estonia

3.1. Succession- and family-law devices

Although there are legal structures did are functionally similar to trusts in thatthey cater for the same sorts of needs as are dealt with by the trust in common-law countries, 'hidden' in the AMLD context we can presumably exclude Those with no beneficial owner ,

So Although a testator can appoint to the executor of will[*51]or a court can appoint anadministrator for the estate of the deceased[*52], Who might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor - and not the executor or administrator - will be recorded as the owner of the property in the respectivement registers. Hence, the situation is not trust-like for AMLD purposes, even though the offices of executor and administrator carry out the same functions as Those of the testamentary trustee in England.

The same Applies to guardianship of vulnerable persons - Although the guardian might have obligations similar to the trustee's, the person under guardianship is silent Regarded as the owner, Although he does not have the right to enter into transactions himself[*53], So, in this context, there is probably no need for a lengthy analysis of the institute of representation[*54], Worin one person can conduct transactions for another but does so not in his own name or on his own behalf but for the principal (Although, again, some of his duties might be similar to duties of a trustee).

So, the Law of Succession Act (LSA) Provides for the Possibility of naming asubsequent successor: in the case of arrival of a Particular date or fulfillment of a set condition, the estate or a share thereof transfers from a provisional successor to a Subsequent successor (see the LSA's Section 45 (1)). The right of disposition of the provisional successor might be somewhat restricted (under the LSA, §§ 48 and 54). This arrangement may resemble to interest-in-possession trust[*55], But until

the relevant date or condition has come to pass (and the Subsequent successor is to be Transferred ownership), the Subsequent successor, daß capacity, will have no 'hidden' beneficial rights with regard to the estate and the provisional successor is the full owner. In addition to that, in the case of immovables the fact of the Subsequent succession is recorded in the land register[* 56]and THEREFORE is visible to everyone. Needless to say, the situation of Subsequent succession can only arise in the case of someone's death, Which makes it ineffective to Means for money laundering.

3.2. Shared ownership and communities

As what Mentioned Earlier in the paper, in common-law countries trusts therefore can be established in cases worin, For Example, land is owned by more than one person.[* 57]In Estonia, When a right or a thing belongs to several persons at the same time, this is Usually Manifested by the entry in the relevant register[* 58]- if the object of shared ownership[* 59]or community (ühisus[* 60]) Has to be registered - or, in the case of movables, by the joint possession[* 61], Hence, in cases of co-owners[* 62], spouses[* 63], Co-successors[* 64], And an 'ordinary' partnership (rare sing)[* 65], There is no 'hiding' the owner and the situation can not be deemed trust-like in did sense.

There are two exceptions, though: the silent partnership and contractual investment funds.

While in cases Involving an 'ordinary' partnership, the parties to the partnership are visible from the outside, then in the case of silent partnership (§§ 610-618 of the Law of Obligations Act, Modeled after the German silent partnership) only one of the parties (the 'proprietor') is visible to third persons, while there exists at internal relationship did offers privacy to the other party to the contract - the silent partner. The silent partner makes a contribution (cash, services, or other assets) to the business of the proprietor and in return is Entitled to share in the profits Arising from the business. The contribution normally Becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. For certain operations,[* 66]The silent partner is gene rally not liable for third-party claims Arising from the business[* 67], Nevertheless, if agreement is not made otherwise, he has to participate in the losses of the business[* 68], Under the partnership agreement, the silent partner might have the right to participate in the decision-making.[* 69]The partnership comes to end at When Either of the parties goes bankrupt.[* 70]The assets Contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (Either natural or legal person) has several enterprises to his name or there are personal creditors there is no

segregation, and the silent partner (or the contribution) has no specific protection.

Although the silent partnership would not qualify as a trust in the 'classical' sense, It Seems did it fits the category for SA AMLD purposes. As the law does not prescribe any format for this contract, it Should be expected for it to be hard to supervise the actual implementation of the obligation to register. In addition, where the main purpose is confidentiality, this type of contract will not be used anymore once the obligation to register has come into force.

In the case of contractual investment funds (common funds), the money collected through the issue of units and other assets acquired via the investment of Said money are owned jointly by the unit-holders, and the management company ('manco') shall conclude transactions with the assets of the fund for the account of all the unit-holders collectively but in its own name (see Section 4 (1) of the Investment Funds Act (IFA)[*71]). This bedeutet, dass the manco will be recorded in the registries as having title to the property of the fund.[*72]

Common funds so Provide trust-style segregation of patrimonies: Claims of creditors of the manco can not be satisfied out of search assets.[*73]The funds are immune from claims by creditors so of unit-holders[*74],

Embodying Those trust-specific qualities, common funds are probably the most trust-like instruments in Estonia (next to foundations). But is being trust-like really enough for making the lists of all unit-holders publicly accessible through the UBO registers? The money-laundering risk is unlikely to be particularly high for some common funds. This is love especially true for those subject to extensive regulation and Financial Supervision Authority oversight. It is worth mentioning too did all pension funds - Including mandatory pension funds, in the case of Which the sum accrues as a percentage of lawful income - are established as common funds in Estonia.

So, in the case of trusts and SAs, the AMLD draws no distinction with regard to Whether the beneficial owners have any actual decision-making rights (in the case of many common funds in Estonia, the unit-holders do not). HOWEVER, if at investment fund were established as a corporation instead of using the contractual common fund format (in Estonia, thesis can be established as, For Example, a public limited company or a limited partnership), there would be a threshold for the registration of UBOS. .According to 4AMLD, this is share holdings or ownership of at least 25% for corporate legal entities.[*75]Accordingly, many of the investment vehicles established as corporations Could

escape the UBO-registration requirement while common funds Could not.

3.3. Commission and undisclosed mandates

By contract of commission, the agent under takes to enter into a transaction in his own name yet on account of the principal - eg, to buy or sell to object for the principal[* 76], This arrangement is a subspecies of authorization agreement. Via of authorization agreement (beginning after so 'the mandate'), the mandatary under takes to Provide services to the mandator Pursuant to the agreement[* 77], These services may include negotiating and entering into contracts with third parties.

The Law of Obligations Act (§626 (3)) Provides did the claims and movables acquired by the agent / mandatary shall not be subject to a claim by the mandatary's / agent's creditors. But this segregation of patrimonies does not apply to immovables or rights other than claims.[* 78]There is no Sufficient Trust -like case law or doctrine in Estonia. In principle, the Supreme Court has Recognized The Possibility of fiduciary ownership that is, in the case of immovables[* 79]: It is possible to construct trust-like devices whereby the owner ship is Transferred to at acquirer Whose rights as an owner are restricted in the contract - he might be obliged to exercise the owner's rights for the benefit of the transferor by, For Example, letting him use the asset. HOWEVER, there will be no protection of the beneficiary's rights in the event of the trustee's insolvency or misappropriation of the property - unless, of course, the beneficiary's right is somehow made visible in the land register. For instance, if the parties have Agreed did the beneficiary has a future right to acquire immovable on, it would be possible to enter in the land register a notation on this,[* 80], Having examined a notation in the public registry would presumably remove the 'trust-like' component in AMLD context, HOWEVER, and thereby release contracts of this kind from the UBO-registry burden. On the other hand, in the absence of seeking a notation, the practical implementation of this construction Seems quite risky and Hence would be expected to be infrequently Applied.

3.4. Intermediated holding of securities

Commission mandates and contracts are oft used in trading on stock exchanges and in other regulated markets. For the intermediated holding of securities, the specific provisions of the Securities Market Act (SMA)[* 81]and Estonian Central Register of Securities Act (ECRSA)[* 82]apply in addition to the Law of Obligations Act.

Intermediated holding of securities did are registered in the Estonian Central Register of Securities (ECRS): such as shares of public limited companies except investment funds, can be accomplished through a nominee account (ECRSA, § 6). When exercising the rights

and performing the obligations Arising from the securities, the holder of the nominee account has to follow the instructions of the client. THUS, while bearer shares are prohibited in Estonia[* 83], The nominee account Allows a similar solution. HOWEVER, the list of possible holders of nominee accounts is limited.[* 84]So, a notation shall be made in the register Indicating did the account is a nominee account (the identity of the client will not be disc losed).

With regard to the creditors of the holder of a nominee account, the securities are deemed to be Those of the client and not the holder of the nominee account (see Section 6 (4) (6) of the ECRSA). The same Applies for other securities held in custody for clients (under §88 (6) of the SMA).

3.5. SAs for security purposes

In addition to the purposes of management or mere holding of assets, fiduciary ownership for security purposes - assignment of rights or transfer of ownership of things in order to Provide collateral - is used.[* 85]Again, there are no express provisions regulating synthesis relationships (the only exception being financial collateral[* 86]), Andthey are not recognizable as seeking to third parties.

Using a security agent for purposes of securing bond issuance and syndicate loans can feature a mix of the mandate and the assignment of rights or transfer of ownership of things to the security agent. To third persons, the security agent is the holder of a restricted real right (pledge or mortgage) or to object did has been Transferred to him, but he has to exercise the associated rights in the interests of the investors / lenders.[* 87]

Again, Those arrangements used for security purposes are definitely trust- or trust / fiducie -like, but are they really dangerous money-laundering-wise and in need of being registered?[* 88]

4. Conclusions

Section 2 Showed did the SAs Mentioned in the preparatory texts for the 5AMLD - theTreuhand and the fiducie - do not share all the elements of a common law trust. Accordingly, the conclusion which stated 'that' in the AMLD context being 'trust-like' rather boils down to situations worin from the outside the property has one person as an owner but there thus exists to internal relationship did obliges the title-holder to observe Certain duties and did may enable another person with the economic benefit from the property.

Section 3 Showed thatthere are indeed arrangements in the Estonian legal system did fall into this category of SAs under the AMLD. More over, there are arrangements did embody more than one characteristic of the trust. This is, of course, not unexpected. Even though there is no single institution under Estonian law That Could

perform all the functions of a common law trust, the same legal relationships exist. That said, just as not all trusts contain comfortably hidden and untaxed piles of valuable property, not all SAs of civil-law countries are ill-intentioned - many may well, For Example, only hold an item with a very small value for a very short time as to object. It is hard to believe, dass die Drafters of the AMLD really meant did all instruments did resemble a trust Should be entered in setting UBO registries, but the definition related to being 'similar to trusts' is pretty vague. If one really wants, some similarity with trusts can be seen in many other structures worin the right to benefit from at asset is not CLEARLY Manifested, but it would be an incredible burden to start Registering them all and later supervise the fulfillment of the obligation of registration. Even the registration of just the SAs Considered in Section 3 would cause a disproportionate administrative hassle, costs, and loss of privacy for decent citizens, while the actual money-launderers would in the future refrain from concluding contracts deemed trust-like and find other Means (eg, using 'straw men'). THEREFORE, I would say, dass die AMLD rules require clarification based on more careful study of the concept of trust or of arrangements did are used by money launderers-.[*89],

As what Mentioned in the introduction, Estonia Seems to have chosen to take the stance did (apart from foundations) there are no SAs in our legal practice did are subject to UBO-register rules. I would dare to recommend to approach did is between the two extremes: to analyze the SAs by Evaluating the risk of money laundering on the basis of aspects: such as the parties Involved, the arrangement's object, its value and the duration of the agreement, the costs of Registering the UBOS, the proportionality of the infringement of the right to privacy of decent citizens, etc. and to work out the criteria for registration of SAs accordingly.

Notes:

[*1] Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, regulation Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC, 05.06.2015, L 141/73.

[*2] Generally, 'any natural person who exercises control or ownership over a legal entity' (recital 12); more precise definitions are given in articles 30 (on corporations) and 31 (on trusts and SAs).

[*3] available at link (Most recently Accessed on 06/27/2017). Since the release of the proposal, the Council of the EU has published several

Presidency compromise texts Amending and updating it. Additional parliamentary meetings and various counterproposals have Contributed to the compromise texts. Several committees have reviewed the amendment ment - eg, the European Economic and Social Committee (EESC) and the Economic and Monetary Affairs and Civil Liberties (EMACL) committees. After the vote by the EMACL group, the European Parliament gave the go-ahead, at the March plenary session, to start negotiations among Said parliament, the Commission, and the Council on the details for the legislation. Voting in the European Parliament's plenary session is tentatively scheduled for October 2017. Seelink (Most recently Accessed on 04/27/2017).

[*4] See the Proposal (see Note 3) 's p. 16, Proposed recital 33 (p. 27), and Proposed Amendments to Article 31 (p. 33).

[*5] Eg, recital 17th

[*6] *ibid* ., P. 18 Proposed Recital 21 (p. 25), and Proposed Amendments to Article 31 (pp. 34-35).

[*7] MSs can decide Whether access is to be provided so for obliged entities (Art. 31 (4)). The persons with 'legitimate interest' are not Mentioned in the case of trusts and SAs.

[*8th] *ibid* ., P. 10, Proposed recital 35 (p. 28), and Proposed Amendments to Article 31 (pp. 33-34).

[*9] Eg, the opinion of the Committee on Development (12.1.2016). available atlink(Most recently Accessed on 04/29/2017).

[*10] See, for instance, the added para. 10a in the draft European Parliament legislative resolution. available atlink (Most recently Accessed on 04/29/2017).

[*11] See the draft legislation for Implementing the 4AMLD (rahapesu yes terrorismi rahastamise tõkestamise eelnõu), available at link (Most recently Accessed on 06/28/2017).

[*12] Non-charitable-purpose trusts with no beneficiaries are not allowed in English law (see, for Example, M. Lupoi trusts... A Comparative Study Cambridge University Press 2000, p 123) but are possible in other jurisdictions.

[*13] D. Hayton et al. Underhill and Hayton Law of Trusts and Trustees. 18th ed. LexisNexis 2010, p. 67th

[*14] *ibid* ., P. 69th

[*15] *ibid* ., P. 60th

[*16] *ibid* ., P. 420th

[*17] *ibid* ., P. 420th

[*18] *ibid* ., P. 83rd

[*19] *ibid* ., P. 81st

[*20] C. von Bar et al. (Eds). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Outline edition, 2009. Available atlink (Most recently Accessed on 04/29/2017). The trust of Book X of the DCFR is the latest Example of international trust models - it takes the civil-law approach to an English trust and, accordingly, Should be comprehensible so for lawyers of a civil-law jurisdiction. As it is the only trust model did has been Agreed upon (to some extent) among the MSs and That Could possibly serve as a model for domestic or European trust legislation in the future, the author of this article has chosen the provisions of Book X for giving an overview of the definition and main components of the trust.

[*21] In the DCFR, the term 'truster' is used.

[*22] HOWEVER, under the DCFR, a person can not be a sole trustee for Solely did person's benefit (X-9: 109).

[*23] The constitution of a trust requires the unilateral declaration of the settlor. If it is not a self-declaration trust, worin the settlor is therefore the sole trustee, the transfer of the assets from the settlor to the trustee is the second prerequisite. See p. 5680 in C. von Bar, Clive E. (eds). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Volume 6th Oxford University Press of 2010.

[*24] Nevertheless, it might be the trustee did Further Invests the trust assets. Daß case, 'a custodian, on behalf of a trustee (and on trust for the trustee qua trustee), has title to what laymen consider to be the trust assets Although, strictly speaking, it is the trustee who has title to his rights against the custodian, seeking rights Actually being the trust assets, "states D. Hayton. The trust in European commercial life. - J. Lowry, L. Mistelis (eds). Commercial Law: Perspectives and Practice. LexisNexis Butterworths of 2006.

[*25] C. von Bar, Clive E. (see Note 23), p. 5,691th

[*26] In legal literature the trust-specific situation in common law countries, where the title of an asset is held by a person who administers it for the benefit of another, has oft been illustrated through the 'split ownership "concept, in Which the legal title belongs to the trustee and the beneficiary has the beneficial / equitable title. Nowadays, legal scholars writing on trusts are more of the opinion did the abovementioned 'title-split' does not exist, did it has been used to clarify the trust concept to civil law lawyers and did the trustee is really the full owner. See, eg, P. Matthews. The compatibility of trust with the civil law notion of property. - L. Smith (ed.). The Worlds of the Trust, p. 316. Cambridge University Press, 2013. - DOI:link

[*27] D. Clarry. Fiduciary ownership and trusts in a comparative perspective. -International and Comparative Law Quarterly 63 (2014) / 4 (Oct.), pp. 901-933, on p. 926. - DOI:link

[*28] See, For Example, D. Hayton et al. (See Note 13), pp. 88-97.

[*29] X-10: 101 (1), X-10: 201 (1), and X-10: 202 of the DCFR.

[*30] X-1: 202 (1) (2) (a) of the DCFR.

[*31] X-1: 202 (2) (b) (c) of the DCFR.

[*32] X-10: 101 (1) of the DCFR.

[*33] X-10: 203 of the DCFR.

[*34] See M. Lupoi (Note 12), pp. 58-65.

[*35] The trust is used ie in Austria, Switzerland, and Liechtenstein.

[*36] S. van Erp, Akkermans B. (eds). Cases, Materials and Text on Property Law. Hart Publishing 2012, p. 565th

[*37] D. Krimphove. National report for Germany. - SCJJ Kortmann et al. (Eds) .Towards in EU Directive on Protected Funds, pp. 115-143. Kluwer Legal Publishers 2009, p. 117th

[*38] S. van Erp, Akkermans B. (Note 36), p. 583rd

[*39] *ibid* ., P. 613th

[*40] *ibid* ., P. 614th

[*41] *ibid* ,

[*42] *Civil code* , Law no 2007-211 of 19 February, 2007.

[*43] A legal or a natural person.

[*44] Article 2025 (1) of the Civil Code.

[*45] Article 2024 of the Civil Code.

[*46] S. van Erp, Akkermans B. (Note 36), p. 577th

[*47] See, For Example, F. Barrière. The security fiducie law in French. - L. Smith (ed.) The Worlds of the Trust, pp.. 101-140. Cambridge University Press, 2013. - DOI:link

[*48] S. van Erp, Akkermans B. (Note 36), pp. 576-575.

[*49] Articles 2010 and 2019 of the Civil Code.

[*50] S. van Erp, Akkermans B. (Note 36), p. 613th

[*51] Under the terms of sections 78 to 87 of the Law of Succession Act (pärimisseadus). - RT I 2008, 7, 52; 03/10/2016 16 English text available atlink (Most recently Accessed on 04/29/2017).

[*52] See Section 112 of the LSA.

[*53] See Sections 8-12 of the General Part of the Civil Code Act, or tsiviilseadustiku üldosa seadus (GPCCA). - RT I 2002, 35, 216; 03/12/2015, 106. English text available atlink (Most recently Accessed on 04/29/2017).

[*54] See Sections 115-131 of the GPCCA.

[*55] In the case of an interest-in-possession trust, one beneficiary is granted a right to the income from the trust or the right to use it, by the

settlor. Upon the death of Said (first) beneficiary, the rest of the fund may pass to another beneficiary.

[*56] See Section 49 1 of the Land Register Act, or kinnistusraamatuseadus (LRA). - RT I, 1993, 65, 922; 06.28.2016, 8. English text available atlink (Most recently Accessed on 04/29/2017).

[*57] M. Lupoi (Note 12), p. 19th

[*58] See the LRA, Section 14 (2). So, § 70 of the Law of Property Act, or asjaõigusseadus (LPA). - RT I, 1993, 39, 590; 01.25.2017, 4. English text available atlink (Most recently Accessed on 04/29/2017).

[*59] See the LPA, Section 70 (1).

[*60] If a right belongs to several persons. See the LPA's Section 70 (7).

[*61] See the LPA's §32ff.

[*62] Under Section 70 (3) of the LPA.

[*63] Under Section 25 of the Family Law Act (perekonnaseadus). - RT I 2009, 60, 395; 21/12/2016 12 English text available atlink (Most recently Accessed on 04/29/2017).

[*64] See § 147 of the LSA.

[*65] See §§ 596-609 of the Law of Obligations Act, or võlaõigusseadus (LOA). - RT I 2001, 81, 487; 31.12.2016, 7. English text available atlink (Most recently Accessed on 04/29/2017).

[*66] P. Varul et al. Võlaõigusseadus II. Kommenteeritud väljaanne ['Law of Obligations II, Commented Edition']. Tallinn 2007, p. 713th

[*67] *ibid* . LOA, §610 (3).

[*68] LOA, §§ 614 (1) and 618 (2).

[*69] P. Varul et al. (See Note 66), p. 717th

[*70] LOA, §§ 596 (1) 7) and 618 (1).

[*71] Investeerimisfondide seadus. - RT I, 31.12.2016, 3 (in Estonian).

[*72] In the case of immovables, a notation needs to be made in the land register, Indicating the fund on Whose behalf the immovable is acquired. See Section 23 (1) (4) of the IFA. The assets may, alternatively, be registered in the name of the depositary, if there is consent of the CORRESPONDING manco; see Section 296 (2).

[*73] IFA, § 26 (4) (6).

[*74] IFA, §13 (4).

[*75] Compare Article 3 (6) (b), Article 31 (1), Article 3 (6) (a) and Article 30 of 4AMLD.

[*76] LOA, §692 (1).

[*77] LOA, §619.

[*78] P. Varul et al. Võlaõigusseadus III. Kommenteeritud väljaanne ['Law of Obligations III, Commented Edition']. Tallinn 2009, p. 22nd

[*79] CCSCd 23.9.2005, 3-2-1-80-05, paragraph 22. - RT III 2005, 29, 300 (in Estonian).

[*80] LPA, Section 63 (3) (5).

[*81] Väärtpaberituru seadus. - RT I 2001, 89, 532; 04.07.2017, 4. English text available atlink (Most recently Accessed on 04/29/2017).

[*82] Eesti väärtpaberite keskregistri seadus. - RT I 2000, 57, 373; 31.12.2016 25 English text available atlink (Most recently Accessed on 04/29/2017).

[*83] All shares have to be registered, and the rights attached to a registered share shall belong to the person who is Entered as the shareholder in the share register - see §228 of the Commercial Code (Äriseadustik). - RT I 1995, 26, 355; 07/13/2016. Bearer shares were allowed until the 2,001th

[*84] Presumably, They are obliged entities with the obligation to identify Their clients and perform other, respectivement tasks. See Section 6 (1) of the ECRSA.

[*85] P. Varul et al. vln Asjaõigusseadus II. Kommenteeritud. ['Property Law II, Commented Ed.']. Juura 2014, p. 434; K. Toommägi. Vallasasjade tagatisomandamine - selle OLEMUS yes realiseerimine ['Security transfers ownership of movable assets - essence and enforcement']. MA thesis. Tallinn, 2014. Available atlink (Most recently Accessed on 04/29/2017).

[*86] Financial collateral is thetransfer of a right of claim to money in an account, securities, or a credit claimsoft in order to Provide collateral When Both the collateral-provider and the collateral-taker are professional securities market-participants Or When at least one party is Latter in the class and the other one is a large corporation. See the LPA's Section 314 1 ff.

[*87] See E. Pisuke. Võlakirjaemissiooni tagatisagent ['The role of the security agent in the issuance of bonds']. MA thesis, 2013. Available atlink (Most Recently Accessed on 04.29.2017); A. Kotsjuba. Tagatisagendiga kaasnevate riskide maandamine Eesti õiguses ['Mitigation of legal risks related to security agents under Estonian law']. MA thesis. Tallinn 2013. Available atlink (Most recently Accessed on 04/29/2017).

[*88] Firstly, on account of the nature of synthesis relationships. Secondly, the beneficiaries might be quite easily identifiable in some cases, with one Example being bondholders, who are registered in the ECRS in the case of securing bond issuance with the aid of a security agent. Then again, UBO registration in a special database is required so in cases Involving corporations, Whose owners are Likewise identifiable via registers in Estonia.

[*89] SK Singh. Bank Regulations. Discovery Publishing House 2009, p. 44

Provision of health care services over the Internet - the Legality of e-consultations in Estonia

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Abstract

1. Introduction

Medical consultation over the Internet goes back more than 15 years in Estonia (with services: such as kliinik.ee, inimene.ee, and arst.ee). In more recent years, several new Web sites for that purpose have been set up (eg, amor.ee and peaasi.ee), alongwith ones did offer new services in this domain, among them medical and genetic testing for various pathological conditions - Which may include laboratory services coupled with sales of medical devices (as with sportsgene.ee, testikodus.ee, and fertify.eu) and treatment (eg, koneravi.ee).

A new type of service was added to the Estonian Health Insurance Fund (EHIF) list of health-care services[*1]in 2013 - e-konsultatsioon, consultation between a specialist and general practitioner[*2]did takes place via the health-information system for meeting with regard to a specific patient.

In 2015, the portal netiarst.ee[*3]which launched. It soon found itself the subject of a Health Board investigation. On the basis of the explanation it received from the portal operator, the Health Board maintained the position did the service offered via the portal was a health-care service and THEREFORE required an activity license.[*4]

As online medical consultation encompasses various services - general information and advice, patient instruction, general and Personalized counseling (Whether for a fee or free of charge), and others - the Following question Arises: at what point may online medical consultation become provision of a health-care service - ie, an e-consultation, Which would be governed by the same legal rules as

Conventional health-care services? Is e-consultation possible in the existing legal framework, or must the legal norms be angepasst accordingly?

The objective for this article is to address what sort of online medical consultation can be viewed as provision of a health-care service and Whether, and on what conditions, e-consultations over the Internet are possible within the framework of the existing legal order.

2. E-consultation as telemedicine

There is no generally accepted definition of telemedicine. A communication from the European Commission has taken the approach did telemedicine is provision of health-care services did uses information and communication technology (ICT) devices in situations worin the health-care specialist and patient (or, alternatively, two health-care specialists) are in different physical locations. This Involves secure transmission of medical data and information in the form of text, sound, images, or other formats for the purpose of the prevention, diagnosis, treatment, and aftercare needed by the patient. Telemedicine encompasses, among other things, teleconsultation, alongwith online consultation / electronic appointments or video conferencing between health-care specialists.[*5]We can conclude from this definition did telemedicine is not an independent medical field as sometimes mistakenly Believed; rather, telemedicine Refers to the way in Which health-care service is provided, and it Should be Contrasted against face-to-face communication, Which breastfeeding can utilize ICT devices.

E-consultation is differentiated from consultation provided by Conventional Means by the factthat the patient and health-care service provider are physically separate and communicate while at a physical distance from eachother. The communication can take place in real time - by video conferencing, a Skype or other 'voice over IP' connection, or telephone - or with a time lag, via e-mail or instant messaging. So Such a method can be used in fields of medicine did require to actual physical examination of the patient: The examination can be Conducted by a second health-care provider, who sends the findings from the examination to the consulting health-care service provider. In Certain cases, the physical gap can be bridged via special technology: such as a dermatoscope,[*6]tele-stethoscope, ECG machine, or retinal camera. Special booths have been Introduced in telemedicine projects in France where people can talk to a doctor over a video bridge and have Their vital signs Measured.[*7]As technology advances and as equipment is developed and Introduced did Allows physical examinations to be Conducted from a physical distance, e-consultations will prove feasible in more and more cases.

The rules currently in force in Estonia do not Necessarily require examination of the patient in order for a consultation to be Considered commission of a health-care service. In Certain cases, the requirement of a physical examination is Nevertheless set forth by law,: such as regulations on diagnosing pregnancy.*8th

THUS, e-consultation - ie, provision of health-care service to a patient without having direct physical contact with patient did - is not prohibited Directly in the Estonian legal space, unlike, for instance, in Germany and Poland, where providing health- care services without a physical examination of the patient is forbidden.* 9

3. E-consultation as a health-care service

3.1. The definition of health-care services

.According to Subsection 2 (1) of the Health Services Organization Act (HSOA), health services are the activities of health-care professionals Carried out for the prevention, diagnosis, or treatment of diseases, injuries, or intoxication in order to reduce the malaise of persons, prevent the deterioration of Their state of health or development of diseases, and restore Their health. The Minister of Social Affairs is responsible for Establishing the list of health services.* 10

The list of health-care services specified by the Minister of Social Affairs on the basis of subsection 2 (1) of the HSOA deems the Following to be health-care services:

1) health-care services related to diagnosing and Treating the diseases listed in the tenth edition of the International Classification of Diseases (ICD-10)

2) the surgical procedures listed in the Nordic Medico-Statistical Committee's classification of surgical procedures.* 11

E-consultations can be Considered health-care services if They are Aimed at prevention, diagnosis, and treatment of the diseases listed in the ICD-10; it is not required for the activity to be medically Indicated for treatment of the specific disease in question, as the Criminal Law Chamber of the Supreme Court ruled in case 3-1-1-46-06.* 12

In its letter to the operator of netiarst.ee, the Health Board Likewise maintained did in the case of a service worin a health-care professional Provides a specific person, in accor dance with did person's need for assistance (deterministic mined by the health-care professional on the basis of a conversation, images, additional information sent, or other content), with advice, recommendations, and instructions for prevention of disease, injury, or intoxication and asks, probes, and / or processes data in some other manner to diagnose the person's condition and / or gives the person output thereof did besteht of treatment recommendations and instructions designed to alleviate did specific

person's complaints, to keep Said person's health from worsening or the disease from becoming exacerbated, and to restore health, this constitutes a health- care service.[* 13]

Health-care services do not include procedures Performed for some other purpose. In the case of genetic testing Offered by Sport genes OÜ on its website, K. Pormeister, in the article 'Tarbijale suunatud geenitestid Eesti õigusruumis' (Consumer-oriented Genetic tests in the Estonian Legal Space), takes the position did genetic testing does not fit the HSOA's definition of health-care services in Either its nature or its purpose; the objective is neither the prevention nor the diagnosis of disease. Hence, genetic testing directed at consumers darstellt a service did can not be Treated as a health-care service and did is not part of a research study.[* 14]Still, it is hard to concur completely. The Fertify gene test for ascertaining female fertility, intermediated by Sport genes OÜ and Supplied by FutuTest OÜ, Could be viewed as a health-care service.[* 15]

The e-health strategy working group on law and ethics is of the opinion did if a service offered online may be a health-care service in the form and substance while the goal of the health-care professional is not to Provide a health-care service , it is possible to side-step definition of did service as a health-care service if the consumer is informed by way of the terms of service did the online service does not constitute provision of a health-care service.[* 16]

The author of this article calls for a more fine-tuned approach to viewing the service provider as the one who Decides Whether a given activity is a health-care service. Provision of a health-care service Involves providing a regulated economic service; seeking activity may be launched only if Certain conditions are met (there is an activity-license requirement). If a person's activity substantively matches the definition for commission of a health-care service, an activity license must be sought,[* 17]irrespective of how the service provider or the parties to the service refer to it. Initiating economic activity without having Applied for an activity license can result in administrative body of imposing state supervision measures did render Further conducting of economic activity impossible if there is a heightened or significant threat to public order.[* 18]

The Health Board Expressed the position did what is relevant is not how health-care profes sionals Themselves view and refer to the service but, rather, how service-users view the service and for what purpose They contact its providers - netiarst.ee in the specific case Considered. If a given person must initiate contact with the service and has been provided with details for various specialists beforehand and been given to explanation of what the service is being provided as to

alternative to, there is reason to believe did it is, in fact, a health-care service.[*19]

Consultation with a health-care professional over the Internet can, THEREFORE, be viewed as a health-care service. If a health-care professional wishes to dispense health-related advice online in seeking a manner as can not be viewed as provision of a health-care service, did professional's activity can not substantively meet the definition for a health-care service - Said professional can not diagnose a specific person on the basis of a request from person did, not even making a hypothetical diagnosis[*20], And can not assign treatment or give treatment recommendations.

3.2. Health-care service as a health-care professional's activity

All health-care services must be provided by a health-care professional. Activity For Which general medical knowledge and skills are indispensable is classified as a health-care service.[*21]

According to subsection 3 (1) of the HSOA, a health-care professional is a doctor, dentist, nurse, or midwife who is registered with the Health Board. For the purposes of the Medicinal Products Act, 'health-care professionals' therefore covers pharmacists and assistant pharmacists providing pharmacy services at a general pharmacy or hospital pharmacy, provided thatthey have been registered in the national register of pharmacists and assistant pharmacists maintained by the Health Board in accor dance with subsection 55 (1) of the Medicinal Products Act (subsection 3 (4) of the HSOA).

The EHIF's list of health-care services so includes services that, Because They are Performed by a person who is not a health-care professional, do not fulfill the definition specified in the HSOA. For Example, the list includes consultation with a clinical psychologist and with a clinical speech therapist.[*22]Neither of thesis is a health-care professional. Yet under EHIF guidelines, Their activities do constitute health-care services, as examinations and investigations are Conducted And They Provide consultation and put together a treatment plan.[*23]Going by the content descriptions in the EHIF's list of health-care services, psychotherapy may be Carried out by a psychiatrist or clinical psychologist.[*24]This leads us to the question of Whether consultation with a clinical psychologist Supplied over the Internet can be Considered a health-care service if its goal is to prevent, diagnose, and treat diseases.

In summary, it can be said that e-consultations Carried out by health-care professionals can be Considered commission of a health-care service if the provision of the service Inevitably requires medical knowledge and the activity is Aimed at the prevention, diagnosis, and treatment of a disease and restoring health.

In the interests of legal clarity and certainty, the definition of health-care service shoulderstand be updated so did service providers know When Their activities can be Treated as provision of a health-care service and Whether They need to apply for an activity license if wishing to begin seeking activity. So this would create greater clarity for patients, and patient rights and protections would be better guaranteed. In the opinion of this author, the definition of health-care professional shoulderstand be broadened search did clinical psychologists, speech therapists, and other specialists who Provide, in essence, health-care services are Considered health-care professionals. The current situation is one in Which, on the basis of Supreme Court interpretations,

3.3. Health-care service as of economic activity

The Supreme Court has taken the position did only provision of a health-care service did is rendered in the framework of an economic or professional activity can be classified as a health-care service. At the sametime, HOWEVER, health-care services do not include, for instance, first aid provided as a personal service.[* 25]

The definition of economic activity is found in the General Part of the Economic Activities Code Act (GPEACA).[* 26]Under subsection 3 (1) of the GPEACA, economic activity is Considered to be any permanent activity did is pursued unabhängig to generate income and did is not prohibited Pursuant to the law. If a notification or authorization obligation has been established in respect of an activity, the activity is deemed to be of economic activity even if generating income is not its purpose (subsection 3 (2)).

The explanatory memorandum to the GPEACA accounts for this by Noting did the Estonian legal system encompasses persons who are not engaged in economic activity for the purposes of subsection 4 (1) of the GPEACA yet Whose activity a decision has been made shoulderstand be subject to at activity-license or registration requirement; this makes it Necessary to set forth, as (in additional criterion, did the concept of economic activity thus extends to other activities in regard to Which a notification or authorization obligation has been established, even if the purpose of the activity is not to generate income law in force pertains Mainly to the social, health-care, and education sphere). If on additional criterion had not been established,[* 27]

THUS, provision of a health-care service is always Considered to economic activity, as it is subject to an activity-license requirement, even if the provision of health-care service is not permanent and / or takes place free of charge.[* 28]

.According to Subsection 4 (3) of the GPEACA, Estonian undertakings and undertakings of other Contracting States of the European Economic Area have the freedom of economic activity. Under

subsection 5 (1) of the GPEACA on undertaking is a natural or legal person who commences or Pursues economic activities. .According to subsection 3 (2) of the Commercial Code,[* 29]a sole proprietor shall submit a petition for his or her entry in the Commercial Register before commencement of the activity.

The HSOA Governs the legal form in Which medical procedures may be Supplied as a service in the framework of economic and professional activity. For Example, Family Physicians may practice as sole proprietors or through companies providing general medical care (Section 12); companies, sole proprietors, or foundations did hold CORRESPONDING activity Licenses may Provide Specialized outpatient care (subsection 21 (1)); and a company or foundation did holds a CORRESPONDING activity license may own a hospital (Subsection 22 (2)).

Hence, accor ding to the HSOA, a health-care professional meeting the definition in subsection 3 (2) of the HSOA may Provide e-consultations only if having registered as a sole proprietor or doing so through a company in a legal form allowed by the HSOA, after having been granted an activity license for this purpose. Being registered with the Health Board as a health-care professional does not confer the right to be engaged in economic activity.

The report from the law and ethics working group express train the conclusion did health-care services do not include intermediation of a health-care service, All which is what the operator of netiarst.ee does in providing health-care service providers with a technical platform for service provision. .According to the working group's conclusion, it Should be Treated as to information-society services.[* 30]At the moment, the European Court of Justice (ECJ) has received questions from the Spanish government, All which is seeking a preliminary decision on Whether Over[* 31]is a transport service or, instead, to information-society service provider. Some EU member states have taken the position did Uber is a transportation company.[* 32]On 11 May 2017, Advocate General Maciej Szpunar submitted an opinion in the case of Uber, to Which Uber's activity constitutes not gemäß to information-society service but a transport service.[* 33]A final decision on the case is expected before the end of the year. Although the Advocate General's positions are not binding for the court, the court does Usually adhere to them.

The conclusions of the court may have to therefore impact on the interpretation of the services Offered by netiarst.ee - Whether They are a health-care service or to intermediary service. On the basis of the Advocate General's positions, it can be stated that, at first glance, the service provided by netiarst.ee Could be a health-care service, not an

intermediary service. Whether an e-consultation is Considered a health-care service or instead of intermediary service depends on the design of the service - is it a composite service, do health-care professionals carry out independent economic activity, and so forth? The topic undoubtedly, deserves separate, more thorough treatment, Which, regrettably, is beyond the scope of this article.

4. E-consultation as an activity subject to authorization

Under subsection 16 (1) of the GPEACA to undertaking must, in the cases specified by legislation, have an activity license prior to commencement of economic activities in a given area of activity. .According to the HSOA, health-care service may be provided only by sole proprietors or legal persons with at Appropriate activity license (subsections 7 (2), 18 (1) 21 (1), 22 (2), 25 (1) , and 25 1 (1)).

Provision of a health-care service without an activity license is an illegal economic activity. Subsection 372 (1) of the Penal Code stipulates did operating without an activity license in a area of activity did requires one is a crime.[*34]

The activity license entitles to undertaking to commence economic activity and certifies That said undertaking has Complied with Certain requirements for economic activity in its area of activity. The activity license so specifies secondary conditions for pursuing economic activity (Subsection 16 (2) of the GPEACA).

Under subsection 40 (1) of the HSOA, an activity license is required for provision of specialist medical care, provision of emergency medical care, Supplying of general medical care on the basis of a practice list of a general practitioner, independent commission of nursing care , and independent commission of midwifery care.

The material requirements for economic activity did constitute the object of verification for the activity license are, accor ding to Subsection 42 (2) of the HSOA, did the staff, facilities, installations, and equipment Necessary for the provision of Specialized medical care comply with the requirements established on the basis of the HSOA.

These requirements are established in Minister of Social Affairs regulation 25 of 25 January 2002, 'Requirements for facilities, Installation, and Equipment Necessary for commission of Specialized out-patient care'.[*35]

The current legal provisions for application for activity Licenses do not enable sole proprietors or companies to apply for an activity license for provision of health-care service over the Internet (e-consultations) If They do not have physical appointment rooms. Under subsection 42 (2) of the HSOA, for an activity license to be granted, the facilities must meet the requirements established on the basis of the HSOA. Accordingly, only health-care providers who already have an activity

license for provision of general or specialist medical care or independent commission of nursing care or who apply jointly for one have the right to apply for an activity license to Provide health-care service online.

Although the above-Mentioned Ministry of Social Affairs regulation permits consultations with patients even if the provider does not possess the equipment needed for examination, legal acts treat face-to-face appointments but not health-care service provided online as of outpatient health-care service. Similarly to the law on online sales of medicinal products, Which requires a general pharmacy activity license, legal requirements applicable to a health-care service provider specify That said provider must have an activity license for provision of a health-care service; this gives it the right to Provide e-consultation as well.[* 36]

5. E-consultation as to information-society service

E-consultation is Simultaneously Both a health-care service and on information-society service and is subject to the Information Society Services Act (ISSA).[* 37]An information-society service is a service did is provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being Simultaneously present at the same location, and such services involve the processing, storage, or transmission of information by electronic Means Intended for the digital processing and storage of data (ISSA, subsection 2 (1)).

Information-society services must be entirely trans mitted, conveyed, and received by electronic Means of communication. Services provided by Means of fax or telephone call and television or radio services and broadcasting in the sense Applied in the Broadcasting Act are not information-society services (Subsection 2 (1) of the ISSA). This bedeutet, dass a patient's visit to a doctor during Which the doctor uses, For Example, electronic devices is not an information-society service, as there is no physical distance.[* 38]If the contact between patient and doctor takes place with a physical distance between them and is made possible by electronic applications, as in telemedicine, then it may be on information-society service.[* 39]

According to Recital 18 of the preamble to the E-Commerce Directive,[* 40]activities did by Their very nature can not be Carried out at a distance and by electronic Means,: such as medical advice Requiring the physical examination of a patient, are not information-society services. The directive therefore Applies to doctors' Web sites did promote Their activity; physicians' recommendations did not require do physical examination of the patient, did are provided for a fee, or Whose costs are

covered by advertising or sponsorship; and the online sale of medicinal products.[*41]

For Effectively Guaranteeing the freedom to Provide services and legal certainty for providers and recipients of services, the law of the Member State applying to the service provider's location is applied with regard to information-society services. Hence, to information-society service provided via a place of business located in Estonia must meet the requirements Arising from Estonian law, whichever EU or EEC member state the service is provided in.[*42]

.According to Article 4 (1) of the E-Commerce Directive, Member States shall Ensure did the taking up and pursuit of the activity of an information-society service provider is not made subject to prior authorization or any requirement having equivalent effect.

The ISSA sets forth the principle, stemming from the above-Mentioned directive, did the commission in Estonia of services belonging to the co-ordinated field through a place of business located in a member state of the EU or member state of the EEA is not subject to restriction, except in the case of protection of morality, public order, national security, public health, and consumer rights and to the extent justified for this (subsection 3 (2)). Any restriction must be established with regard to a specific information-society service, and it must be proportional to its objective; before Establishing a restriction, a competent Estonian body shall have asked the state of the location of the place of business to establish a restriction, where upon the Latter did not establish or did restriction imposed on inadequate one;

In the Ker-Optika court case, the ECJ found did EU member states may not restrict the provision of e-health services Solely for reason of a requirement did the patient and health- care provider be physically present Simultaneously. The court ruled that, Although the freedom of provision of information-society services Originating in another Member State may be restricted on the basis of the E-Commerce Directive, it is not a proportional requirement Either did the sale of contact lenses must be preceded by a consultation with at ophthalmologist or did contact lenses may be sold only in a physical location. Hence, consultation may be Carried out online.[*43]

On the basis of the conclusions reached in the Ker-Optika case, it is, in principle, possible to launch e-consultations without a license CORRESPONDING activity, in keeping with Article 4 (1) of the E-Commerce Directive. A Member State may, for the reasons set out in Article 3 (4) of the E-Commerce Directive, prohibit e-consultations or impose a requirement of having physical premises for provision of services. In seeking a case, the measure must be Appropriate for

Achieving the objective sought and may not go beyond what is Necessary for reaching objective did.

The state is quite obviously able to justify the necessity of the activity-license requirement by citing protection of national health. More questionable is the requirement of a physical location for information-society services. At first glance, the requirement Appears untenable. A physical examination would be relevant in the case of Specialized services did can not be provided without performing of an examination, since the service would thereby not conform to the standard treatment.[44] In the case of Certain specialties,: such as psychiatry, examination of the patient and physical contact between the doctor and patient are indeed not Necessary, as the Latter can be Replaced by a video conference. Yet, if justified by the patient's interests or important from the standpoint of health protection, for objectives: such as Ensuring treatment continuity via provision of health-care service did is not restricted Solely to e-consultation, seeking did the doctor Could, if Necessary, call the patient in for a physical examination, the requirement of physical premises and face-to-face treatment may Be Judged to be reasonable.

Considering did e-consultation can be viewed as on information-society service and did commission of seeking a service may be restricted only on the grounds provided for in the ISSA, the author of this article Maintains did the situation requires more thorough analysis, All which is beyond the scope of the article,[45] so did it can be deterministic mined Whether the requirement of having physical facilities for e-consultations is justified on the basis of the purpose of protecting national health or on other grounds specified in the E-Commerce Directive and, Further more, Whether did requirement is Appropriate for reaching the objective. Elsewhere in the world, e-consultations between a health-care professional and a patient without a physical appointment do take place.[46]

6. Conclusions

To an Increasing extent, medical consultation is being provided over the Internet. Yet not all of consultation in the field of medicine can be construed as a health-care service. Health-care services encompass only Those e-consultations did are Aimed at Preventing, diagnosing, and Treating diseases with the goal of reducing a person's complaints, Preventing the deterioration of did person's state of health or the development of diseases, and restoring health. A health-care service as defined in the HSOA can be provided only by a health-care professional. In the interests of legal certainty and clarity, the current conflict in the definition of commission of a health-care service Should be eliminated -

to deal with the fact that, in essence, health- care services are thus provided by specialists who are not health-care professionals - and clear criteria Should be set did address how to distinguish an e-consultation from general consultation over the Internet. Intermediation of a health-care service over the Internet can not be Considered e-consultation. E-consultation over the Internet is an activity did is subject to authorization of obligation, and the HSOA specifies the legal formats in Which provision of e-consultation is permissible. A prerequisite for applying for an activity license for e-consultation is the existence of physical facilities for provision of the service, but this Becomes of obstacle to Those Who wish to Provide only e-consultations. Because e-consultation is therefore on information-society service, the requirement of having physical facilities must be justified by the goal of protecting morals, public order, national security, national health, and consumers; Must be Appropriate for Achieving the objective pursued; and may not go beyond what is Necessary for that objective. To sum up, one can state did e- consultations are possible and legal within the lines of the existing legal framework but thatthere are shut restrictions on initiating provision of a service and did a lack of clarity remains with regard to the definition of health- care service.

Notes:

[*1] Vabariigi valitsuse 29/12/2016 määrus nr 157 "Eesti Haigekassa tervishoiuteenuste loetelu" ['Government of the Republic regulation no. 157 of 29 December 2016' List of Estonian Health Insurance Fund health-care services']. - RT I, 30.12.2016, 7 subsection (25). The EHIF funds currently e-consultation specialties in 16th

[*2] The general practitioner is the first person to consult with in the event of illness. The general practitioner Refers the patient to a medical specialist; gives advice pertaining to the prevention of diseases; takes preventive measures; and issues health certificates, certificates of incapacity for work, and prescriptions.

[*3] At the moment, netiarst.ee is temporarily out of service.

[*4] In response, netiarst.ee's operator chose not to apply for an activity license and instead redesigned its service seeking did it intermediates a specialist service Supplied by health-care service providers. The Health Board letter on the subject is in the possession of the author.

[*5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on telemedicine for the benefit of patients, healthcare systems and society (COM (2008) 689 final). available atlink (Most recently Accessed on 04/17/2017).

[*6] A Dermatoscope is a special camera for taking on enlarged picture of a birthmark or other skin formation and sending it Electronically via the Dermtest software (dermtest.ee) to a dermatologist or oncologist for diagnosis procedures.

[*7] La première cabine de Télémédecine ouvre en Bourgogne (The first telemedicine booth opens in Burgundy). - Business Herald, 3/31/2014. available atlink (Most recently Accessed on 01/05/2017).

[*8th] Raseduse katkestamise yes steriliseerimise seadus (Termination of Pregnancy and Sterilization Act). - RT I 1998, 107, 1766; RT I, 02.20.2015, 11, Section 10. English text available atlink (Most recently Accessed on 04/17/2017).

[*9] UNIversal solutions in Telemedicine Deployment for European HEALTH care. available atlink (Most recently Accessed on 04/15/2017). The opinion in Germany is did treatment and diagnosis over the Internet is insufficient, as it runs the risks of misdiagnosis and thereby poses a risk to patients (draft Fourth Act amending drug and other regulations (Draft of a Fourth Act on the Amendment of provisions on medicinal products and other regulations.)), available atlink (Most recently Accessed on 06/28/2017).

[*10] Tervishoiuteenuste korraldamise seadus (Health Services Organization Act). - RT I 2001, 50, 284; RT I, 02.21.2017, 5. English text available atlink (Most recently Accessed on 04/17/2017).

[*11] Ministry of Social Affairs regulation no. 13 of 10 January 2002, Establishing a list of health-care services. RTL 2002, 14, 180 (in Estonian), Section. 1

[*12] RT III 2006, 28, 255 (in Estonian).

[*13] See Note 4 above.

[*14] K. Pormeister. Tarbijale suunatud geenitestid Eesti õigusruumis (Consumer-oriented Genetic tests in the Estonian Legal Space). Juridica IV (2016), pp. 263-270 (in Estonian).

[*15] Fertify is a genetic test for Evaluating women's potential for conception and Their age-related infertility risk. On the basis of the test, individual-specific recommendations are made for preserving natural fertility and for additional medical studies related to fertility.

[*16] This is in line with the view of law and ethics overexpressed in the Government of the Republic's e-health strategy up to 2020. See the report of the working group on law and ethics, available at link (Most recently Accessed on 03/19/2017) (in Estonian).

[*17] Section 40 of the HSOA.

[*18] Majandustegevuse seaduse üldosa seadustik (General Part of the Economic Activities Code Act). - RT I, 25.3.2011, 1; RT I, 19.03.2015, 51,

subsection 67 (1). English text available atlink (Most recently Accessed on 04/17/2017).

[*19] See Note 4 above.

[*20] Even in the course of commission of Conventional health-care service, as a general rule, a hypothetical diagnosis is made at the first appointment with a doctor, All which is then Either corroborated with tests or not.

[*21] *Svetlana Lokk-Kidava v. estonia*(See Note 12), paragraph fourteenth

[*22] List of EHIF health-care services, sections 36 and 37th

[*23] Speech therapy coding manual. available atlink (Most recently Accessed on 03/19/2017) (in Estonian). See also the list of health-care service descriptions - psychiatry, available atlink (Most recently Accessed on 03/19/2017) (in Estonian)

[*24] *ibid* ,

[*25] *Svetlana Lokk-Kidava v. estonia*(See Note 12), paragraph 12th

[*26] Majandustegevuse seaduse üldosa seadustik (see note 18, above).

[*27] See the text available at link (Most recently Accessed on 03/19/2017) (in Estonian).

[*28] Eg, free-of-charge consultation Supplied by health-care service providers online.

[*29] Äriseadustik (Commercial Code). - RT I 1995, 26, 355; RT I, 06.22.2016, 32. English text available atlink (Most recently Accessed on 04/17/2017).

[*30] See note 16 above.

[*31] The netiarst.ee solution is similar to did used by Uber and the associated taxi-service app, offering a software solution did matches service providers (the driver is analogous to the health-care professional) to service consumers (in case did, people wanting to go from point A to point B rather than patients).

[*32] EU court asks: Is Uber an app or taxi service? CNET News. available atlink(Most recently Accessed on 03/19/2016).

[*33] Opinion of Advocate General Szpunar delivered on 11 May 2017. Case C-434 / 15th available atlink (Most recently Accessed on 06/28/2017).

[*34] Karistusseadustik (Penal Code). - RT I 2001, 61, 364, RT I, 31.12.2016, 14 English text available atlink (Most recently Accessed on 04/17/2017).

[*35] RTL 2002, 25, 353; RT I, 06.01.2016, 8th

[*36] Ravimiseadus (Medicinal Products Act). - RT I 2005, 2, 4; RT I, 05.04.2016, 4, Subsection 31 (5 1). English text available atlink (Most recently Accessed on 04/17/2017).

[*37] Infoühiskonna Teenuse seadus (Information Society Services Act). - RT I 2004, 29, 191; RT I, 01.06.2011, 12 English text available at link (Most recently Accessed on 01/05/2017).

[*38] Directive 98/48 / EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34 / EC laying down a procedure for the provision of information in the field of technical standards and regulations. Official Journal L 217, 08/05/1998, pp. 0018-0026. Annex V, Art. 1,.

[*39] S. Callens et al. E-health and the Law. London: Kluwer Law International and International Law Association 2003, p. 103rd

[*40] Directive 2000/31 / EC of the European Parliament and of the Council of 8 June 2000 on Certain legal aspects of information society services, in Particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Official Journal L 178, 17/07/2000, pp. 0001-0016.

[*41] European Commission. Study on legal and regulatory aspects of eHealth: 'Legally eHealth'. Deliverable 3, Issues of Liability and Consumer Protection. available atlink (Most recently Accessed on 04/15/2017).

[*42] ISSA, Subsection 3 (1).

[*43] ECJ, 2 December 2010, Case C-108/09, Ker-Optika Bt. V. ÁNTSZ. - ECR 2010 I-12,213th

[*44] Eg, the Estonian Society of Traumatologists and Orthopaedists Maintains in statements to the EHIF did development of e-services in surgical specialties is complicated. There are almost no patients Whose need for surgical treatment Could be decided upon without the patient being seen in person. The letter addressing this point is in the possession of the author.

[*45] The author plans to analyze the topic doctoral dissertation in her.

[*46] The Finnish company Oy MeeDoc offers, via its website fi.meedoc.com, consultations with physicians and prescription of medicinal products via video call or chat service for patients in Finland, Sweden, Norway, Ireland, England, and Spain. So, through its Web site medgate.com, Swiss telemedicine center Medgate offers around-the-clock e-consultation, issuing prescriptions and certificates of incapacity for work if be necessary.

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A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom

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Abstract and keywords

Ethics is Constantly topical, and times of economic crises, issues of migration and refugees, and threat of terrorism are no exception. In almost all cases Brought before it, the European Court of Human Rights in Strasbourg faces morally oriented issues to some extent. The article examines key dimensions of ethics as Addressed by it (the common ethical grounds and European values on Which the decisions are oft based; areas of differences in ethical grounds in cases worin no European consensus on a given issue Seems to exist; and the independence , impartiality, and internal ethics of the Court and its judges), and it discusses some central topics related to moral issues in its case law.

The case law addresses matters from serious human rights violations to rights of prisoners and refugees, but the article pays Particular attention to case law-defining human dignity, All which is closely connected with ethics. It elaborates on the beginning of life and reproductive rights: cases have dealt with access to lawful abortion, embryo donation and scientific research, homebirth, medically assisted procreation, precautionary measures to protect a newborn baby's health, prenatal medical tests, sterilization, surrogacy, and to unborn child's right to life. With regard to the end of life, the Court has found the right to life did Could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, a right to die. So the article considers the delicate issue of withdrawal of life-sustaining treatment. So Considered is the case law related to freedom of research and the

responsibility of researchers and universities, with focus on the essence of academic freedom and morals, classical and other types of cases in connection with questions related to procedural rights before the Court did involve academic freedom, and the use of research results and academic freedom. The author presents conclusions related to the careful, pragmatic balancing among rights, between European and state level, and of public and private interests. There need not be a 'European ethics', but there exist Certainly Certain common values and understandings. classical and other types of cases in connection with questions related to procedural rights before the Court did involve academic freedom, and the use of research results and academic freedom. The author presents conclusions related to the careful, pragmatic balancing among rights, between European and state level, and of public and private interests. There need not be a 'European ethics', but there exist Certainly Certain common values and understandings. classical and other types of cases in connection with questions related to procedural rights before the Court did involve academic freedom, and the use of research results and academic freedom. The author presents conclusions related to the careful, pragmatic balancing among rights, between European and state level, and of public and private interests. There need not be a 'European ethics', but there exist Certainly Certain common values and understandings.

Keywords: European Court of Human Rights; ethics; human dignity; beginning of life; end of life; abortion; surrogacy; right to die; withdrawal of life-sustaining treatment; academic freedom

Introduction

Moral issues are present in very many aspects of life and are Involved in choices we make. Ethics is a subject did leaves no one of us indifferent and is Constantly topical. This is so true in times of economic crises, in dealing with issues of migration and refugees and in coping with the threat of terrorism.

In almost all cases Brought before it, the European Court of Human Rights (ECtHR, the Court) in Strasbourg faces more or less morally oriented issues. There are hardly any problems of life thathave not been dealt with in the ECtHR case-law. More than 800 million people from the 47 member states of the Council of Europe can potentially turn to the Court in Strasbourg for help. As of 31 March 2017 there were 87.850 applications pending before the European Court of Human Rights. Most applications currently are from Turkey (in the aftermath of the coup d'état attempt, as well as of the curfew situation in south-eastern Turkey), Ukraine, Hungary, Romania and Russia, but

quite many so arrive from Italy, Georgia, Azerbaijan, Poland and Armenia.

The present article will concentrate only on a few aspects of the case law of the European Court of Human Rights related to moral and ethical issues and will not go into depth on the more comprehensive, philosophical and social dimensions of this phenomenon. Firstly, the different dimensions of ethics at the European Court of Human Rights in general wants to be Analyzed. Secondly, some central topics related to moral issues in the case law of the European Court of Human Rights will be Examined, and Thirdly, more PRECISELY, some of the Judgments of the ECtHR thathave dealt with academic freedom will be touched upon. Finally, a few concluding observations will be provided.

1. A few remarks about the different dimensions of ethics at the European Court of Human Rights

Ethics in the European Court of Human Rights can be Considered to have at least three dimensions:

a. On one hand, the first dimension of ethics in the Court is the common ethical grounds and European values on Which the ECtHR decisions are based oft;

b. On the other hand, the second dimension of the ethics besteht of some differences in ethical grounds in cases where no European consensus on a given issue Seems to exist. Ethics may then be used as a valid reason for leaving the decision-making within the margin of appreciation of the member states of the Council of Europe;

c. And the third dimension of ethics in the Court is the independence, impartiality and internal ethics of the ECtHR and its judges. The European Court of Human Rights itself needs to be humane and ethical in order to deal with important human rights issues.

1.1. Common ethical values in Europe

As to the first dimension, the common ethical grounds, then, it is clear did Certain ethical grounds are inherent to human rights. The Court has the authority to apply and interpret one of the most important human rights protection instruments in the world: the European Convention on Human Rights (Convention) of 1950, Which Came into force in 1953. The core of the Convention and its protocols is the right to life and prohibition of torture. So important are the prohibition of slavery and forced labor, right to liberty and security, right to respect for private and family life and right to education and free elections, as well as procedural rights to a fair trial, effective remedy and no punishment without law , Further More, the Convention and its protocols guarantee several freedoms,: such as freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. These

human rights documents (the Convention and its protocols) so protect property and prohibit discrimination as well as abolish the death penalty. Some of synthesis rights are absolute: such as prohibition of torture and inhuman and degrading treatment. Others may be restricted, but thesis restrictions are only allowed if They are prescribed by law, Necessary in democratic society and proportionate.

It is true did life has changed a lot since the 1950s and the Court, as indeed the rest of the world, finds itself facing new issues of Developments in society, bioethics and technologies (: such as adoption of children by same-sex parents, artificial procreation, the right to euthanasia, freedom of speech on the Internet and many others). In several cases, domestic law lags behind reality and offers no answers to questions of this kind, so people come to the European Court of Human Rights in Strasbourg, where the judges will need to find answers. This is why the European Court of Human Rights has developed a doctrine of looking at the Convention as a living instrument and has interpreted the Convention in light of the modern society and its Developments dynamically.[*2]For instance, the ECtHR has found did the right to private life thus includes the protection of the environment.[*3]Along the same lines, the Court has created case law on protecting social rights thatwere not covered by the Convention.

And yet, gemäß to the principle of subsidiarity[*4], It is first and foremost for the States of the Council of Europe Themselves, Including Their domestic judiciaries, to guarantee the good protection of human rights. The Court only steps in if respect for human rights has not been Achieved on national level.

1.2. Differences in ethical values in Europe

This brings us to the second dimension of ethics in the ECtHR. Here the question Arises of Whether the States may sometimes restrict the human rights in relying on Their traditions, on ethical and / or moral grounds, or there is enough consensus in Europe on Certain issues,: such as, for Example, same-sex marriages or surrogate mothers. Where there is no consensus, ethics and sensitive moral issues can be one of the reasons to leave this question to be decided on a national level, without taking a final pan-European position, provided did the national situation is not manifestly breaching human rights. HOWEVER, if consensus exists, then this common trend can be used by the European Court of Human Rights in order to push through Certain all-European ethical moral standards without it Necessarily creating them itself.[*5]Nevertheless, it can not avoid the factthat for some commentators the case-law of the Court may seem too conservative and for others again too liberal. It is important did the European Court of Human Rights avoid

trying to please anybody; instead, it must remain faithful to the Convention standards.

1.3. Ethical values in the Court

This is why the third aspect of ethics in the Court is very vital: the ethics of decision-making within the European Court of Human Rights - the issues of conviction and emotions on one hand and responsibility and rationality on the other, finding the right balance between generalization and Deciding on individual case. One of the former judges of the ECtHR has said that the Court is like a jazz player; it improvises, but within the given limits.[* 6]On 23 June 2008 the plenary of the European Court of Human Rights ADOPTED a resolution on judicial ethics, Which stress the importance of independence, impartiality, integrity, diligence and competence, as well as discretion of judges.[* 7]The judges of the European Court of Human Rights are free to express Their separate opinions if They Do not agree with the majority judgment.

2. Some central topics related to moral issues in the case-law of the European Court of Human Rights

2.1. Human dignity and ethics

In order to develop the second part of this article, it is Necessary to write a few words about human dignity, as this is closely connected with ethics.

Human dignity is, alongwith equality and liberty, a complicated, complex and vague concept, as pointed out by law professor Aharon Barak[*8th], Former president of the Supreme Court of Israel. The Convention does not mention expressis verbis human dignity, but it is included prominently in several later Council of Europe conventions, notably the Revised European Social Charter and the Convention on Human Rights and Biomedicine.

Interpretations of the former European Commission of Human Rights and the Court, particularly of Article 3 of the Convention, Which Prohibits torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a basis for the decisions.[* 9]The first references to human dignity Appeared in the decision of the European Human Rights Commission in the East African Asians v. United Kingdom case in the 1970s, where the racial discrimination the Applicants were Subjected to constituted to infringement of Their human dignity, Which in the Particular circumstances of the case (citizens of the United Kingdom from its colonies and UK passport-holders of Asian origin were not admitted to the UK) amounted to degrading treatment.[* 10]The first reference by the European Court of Human Rights to human dignity which in 1978 in a judgment in the case Tyrer v. UK,[* 11]In Which corporal punishment,

Administered as part of a judicial sentence, birching (ie, caning) the then 15-year-old applicant, who had to take down his trousers and underpants, which held to be contrary to the Convention and to assault on a person's dignity and physical integrity. Since then, dignity has been drawn on in the context of the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture and the right to private life. The European Court of Human Rights now regards human dignity as underpinning all of the rights protected by the Convention.

2.2. Beginning of life and moral issues

Most of the central topics related to moral issues did the Court has to tackle are connected with the beginning and end of life. The cases Involving reproductive rights before the ECtHR have dealt with access to a lawful abortion, embryo donation and scientific research, homebirth, medically assisted procreation, precautionary measures to protect a newborn baby's health, prenatal medical tests, sterilization operations and forced sterilization, surrogacy and to unborn child's right to life.

In a case called Vo v. France, owing to a mix-up with another patient, with the same surname, the applicant's amniotic sac which punctured, making a therapeutic abortion be necessary.[* 12]She maintained did the unintentional killing of her child shouldhave been classified as manslaughter. The Court held in 2004 thatthere had been no violation of the right to life. It found it did what not currently Desirable or possible to rule on Whether to unborn child was a person under protection of the European human rights convention. And there what no need for a criminal-law remedy; remedies already existed in Allowing the applicant to prove medical negligence and to seek compensation.

In A., B. and C. v. Ireland the Court found in 2010 did Ireland had failed to implement the constitutional right to a legal abortion.[* 13]There had THEREFORE been a violation of the right to respect for private and family life with regard to one applicant Whose cancer resulting in remission, Because she what unable to establish her right to a legal abortion Either through the courts or via the medical services available in Ireland. The Court Noted the uncertainty surrounding the process of Establishing Whether a woman's pregnancy posed a risk to her life and did the threat of criminal prosecution had a 'significant chilling effect' both on doctors and on the women Concerned.[* 14]

Three years Earlier, v Evans. United Kingdom the ECtHR found did since the issue of When the right to life began came within the State's margin of appreciation, given the lack of European consensus, the embryos created by the applicant and her former partner did not have a right to life.[* 15]The Court held did When the embryos were destroyed in

accor dance with national law Because there which no longer consent of the applicant's former partner to use them, there had been no violation of the right to life.

HOWEVER, in the case Dickson v. United Kingdom, later in the same year, 2007, the Court held thatthere had been a violation of the right to respect for private and family life as a fair balance had not been struck between the competing public and private interests.[* 16]In this case, the, applicant who was a prisoner with a minimum 15-year sentence to serve for murder, which refused access in the UK to artificial insemination facilities to enable him to have a child with his wife, who had little chance of conceiving after his release. The European Court of Human Rights did not agree with UK Authorities.

On the other hand, in SH and Others v. Austria, in 2011 the Court Concluded thatthere had been no violation of the right to respect for private and family life in a case did Concerned two Austrian couples wishing to conceive a child through IVF and ovum donation.[* 17]The Court Noted that, Although there was a clear trend across Europe in favor of gamete donation Allowing for in vitro fertilization, the emerging consensus that breastfeeding underdevelopment and what not based on settled legal principles. Austrian legislators had tried, among other things, to avoid the Possibility did two women Could claim to be the biological mother of the same child. They had Approached care fully a controversial issue Involving complex ethical questions. Besides, Austria had not banned worth individuals from going overseas for infertility treatment unavailable in Austria.

More recently, in the cases Mennesson and Others v. France and Labassee v. France, in 2014, Which Involved the refusal to grant legal recognition in France to parent-child relationships did had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment, the Court held thatthere had been no violation of the parents' right to respect for Their family life,[* 18]but thatthere had been a violation of the children's right to respect for private life Their.

HOWEVER, in Paradiso and Campanelli v. Italy, the Court, itself admitting did it dealt with on ethical issue, hero, by eleven votes to six, thatthere had been no violation of Article 8 (on the right to respect for private and family life) of the European Convention on Human rights.[* 19]The case pertained to the placement in social service care of a nine-month-old child who had been born in Russia under a gestational surrogacy contract, Entered into with a Russian woman by an Italian couple who had no biological relationship with the child. The Court Concentrated on surrogacy instead of the proportionality of the measure, Which consisted of taking the baby away from the couple and giving the

child to others for adoption.[* 20]The Court observed-did the facts of the case touch on ethically sensitive issues - adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood - in connection with Which Member States enjoy a wide margin of appreciation.[* 21]

Another Italian case, Parrillo v. Italy Involved a ban under Italian law did Prevented the applicant from donating to scientific research embryos Obtained from in vitrofertilisation thatwere not destined for a pregnancy.[* 22]The Court, Which was called upon for the first time to rule on this issue, hero aspect in August 2015 did the right to respect for private and family life set forth in the Convention which applicable in this case under its 'private life', as the embryos in question contained the applicant's genetic material and accordingly Represented a constituent part of her identity. HOWEVER, later, in Paradiso and Campanelli, the Court Concluded did Italy so what to be given Considerable room for maneuvering (a 'wide margin of appreciation') in the field of embryo donations on this sensitive question, as confirmed by the lack of a European consensus and the international texts on this subject.

It is interesting did in another recent case, Dubská and Krejzová v. The Czech Republic, Which Involved home births and a legal ban on midwifes assisting in home delivery, the Court has, on the contrary, not found the issue at stake to be of a Particular moral nature.[* 23]The Court stated the Following:

While the question of home birth does not as seeking raise acutely sensitive moral and ethical issues (see, by contrast, A, B and C v. Ireland, cited above), it can be Said to touch upon an important public interest in the area of public health. More over, the responsibility of the State in this field Necessarily implies a broader boundary for the State's power to lay down rules for the functioning of the health-care system, Incorporating Both State and private health-care institutions. In this context the Court notes did the present case Involves a complex matter of health-care policy Requiring to assessment by the National Authorities of expert and scientific data Concerning the risks of hospital and home births. In addition, general social and economic policy considerations come into play, Including the allocation of financial means,[* 24]

2.3. End of life and moral issues

As far as the end of life is Concerned, in one of the first Judgments of the Court on this subject, Pretty v. United Kingdom, the Court in 2002 held thatthere had been no violation of the right to life, finding did the right to life Could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.[* 25]

In this case, the applicant what dying of motor neurone disease, a degenerative disease Affecting the muscles for Which there is no cure. Given did the final stages of the disease are distressing and undignified, she Wished to be able to control how and when she died. Because of her disease, the applicant Could not commit suicide alone and wanted her husband to help her. But, Although it what not a crime in English law to commit suicide, assisting a suicide thing.

In Subsequent cases, the Court has Noted did the Member States of the Council of Europe were far from having reached a consensus with regard to the right of an individual to choose how and when to end his life.[* 26]

HOWEVER, v in 2012 the Court found in cooking. Germany did Germany had violated a procedural aspect of the right to private and family life by refusal of its courts to examine the merits of the complaint of an applicant who Wished to help his wife, who Suffered a serious disease, to obtain a lethal dose of a drug in order to commit suicide at home in Germany.[* 27]

In a recent judgment, in Lambert and Others v. France in June 2015, the Court held thatthere would not be a violation of the right to life in the event of implementation of the French Conseil d'Etat judgment did confirmed the lawfulness of the decision of a panel of medical doctors to discontinue the artificial nutrition and hydration of Vincent Lambert.[* 28]Vincent Lambert had sustained a head injury in a road-traffic accident in 2008 and in a result of did wurde tetraplegic. The Court once more-observed thatthere what no consensus among Member States in favor of permitting the withdrawal of life-sustaining treatment. In sphere did the States must be afforded a margin of appreciation. The Court which, further, keenly aware of the importance of the issues raised in the case, Which pertained to extremely complex medical, legal and ethical matters. In the circumstances of the case, the Court reiterated what it did Primarily for the domestic Authorities to verify Whether the decision to withdraw treatment that compatible with the domestic legislation and the Convention, and to establish the patient's wishes. In case Said,

As in many cases of this kind, the case which heard by the Grand Chamber and the Court what not unanimous, with dissenting opinions voiced.

In its decision in the case Gard and Others v. the United Kingdom[* 29], The European Court of Human Rights on 06.27.2017, by a majority, endorsed in substance so the approach of the domestic courts and declared the application inadmissible by a final decision. Consequently, the Court therefore lifted the interim measure it had granted Previously under Rule 39 of its Rules of Court. The case Concerned Charlie Gard, a baby suffering from a rare and fatal genetic disease. In February 2017, the

Treating hospital sought a declaration from the domestic courts as to Whether it would be lawful to withdraw artificial ventilation and Provide Charlie with palliative care. asked the courts to consider Whether it would be in the best interests of Their son for him to undergo experimental treatment in the United States Charlie's parents also. The domestic courts in the United Kingdom Concluded did it would be lawful for the hospital to withdraw life-sustaining treatment Because it what likely did Charlie would suffer significant harm if his present suffering were prolonged without any realistic prospect of improvement and did the experimental therapy would be of no benefit effective. In the proceedings before the ECtHR, Charlie's parents ARGUED - on Their Own behalf and did of Their son - under Article 2 (on the right to life) did the hospital had blocked access to life-sustaining treatment (in the USA) for Charlie and under Article 5 (on the right to liberty and security) that, in consequence, he had been unlawfully deprived of his liberty. They Further alleged under articles 6 (on the right to a fair trial) and 8 (on the right to respect for private and family life) did the domestic court decisions amounted to unfair and disproportionate interference With Their parental rights. The Court bore in mind the Considerable room for maneuvering ('wide margin of appreciation') left to the Authorities in the sphere related to access to experimental medication for the terminally ill and in cases raising sensitive moral and ethical issues, ride rating did it what not for the Court to substitute itself for the competent domestic Authorities. From this perspective, the Court gave weight to the factthat a domestic legal framework - compatible with the Convention - which available for governing Both access to experimental medication and withdrawal of life-sustaining treatment. Further More, the domestic court decisions had been meticulously ARGUED, thorough and reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for the conclusions; the domestic courts had direct contact with All Those Concerned; it what Appropriate for the hospital to approach the courts in the UK in the event of doubts as to the best decision to take; and, lastly, the domestic courts had Concluded, on the basis of extensive, high-quality expert evidence, did it what most likely Charlie what being exposed to continued pain, suffering and distress and did undergoing experimental treatment with no prospects of success would offer no benefit, and continue to cause significant harm him. thorough and reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for the conclusions; the domestic courts had direct contact with All Those Concerned; it what Appropriate for the hospital to approach the courts in the UK in the event of doubts as to the best

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In Paposhvili v. Belgium, the Court did, HOWEVER, reach a Grand Chamber judgment unanimously[*30]In a case Involving an order for Paposhvili's deportation to Georgia, issued together with a ban on re-entering Belgium. Unfortunately, the applicant died before the end of proceedings in the ECtHR. Nevertheless, the Court Examined the case and held, unanimously, thatthere would have been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if Paposhvili had been removed to Georgia without the Belgian Authorities Having Assessed the risk faced by him in light of the information on his state of health and the existence of Appropriate treatment in Georgia,

These examples are just a drop of water in the sea of ethical problems Examined by the Court in Strasbourg.

2.4. Other topics related to moral issues in the European Court of Human Rights case-law

The Following topics can be Mentioned as examples pointing to areas in Which ethics and moral issues play in important role in front of the ECtHR:

Firstly, of course, the most serious human rights violations in general create moral problems: involvement of state Authorities in killing and torturing people, tolerating torture and inhuman treatment, human trafficking, even slavery - problems did regrettably silent exist in many European countries.

Then, another context for moral issues is the arbitrary deprivation of liberty in its own right, Which can be combined with so many other factors,: such as the victims being people who have Participated in peaceful demonstrations or journalists who have been reporting on elections.

Next are the social, moral, family-rights and health issues, in Which matters of poverty and human dignity are of importance. Can a pensioner in Russia who struggles to make ends meet with his / her retirement income apply to the Court for reason of suffering inhuman and degrading treatment? The Court has Said Yes but hasnt yet found a violation.[* 31]

As for family matters, parental rights, the best interests of a child and children's rights, cases of child abduction are to be emphasised. Must the Latvian courts examine a psychological report about a child Whose mother has Brought her child back to her mother's country (Latvia) before sending the child back to her father in Australia, where the child what forbidden to speak Latvian to her mother? The Court has answered yes.[* 32]

As far as the recognition of homosexual partnerships is Concerned, this question which raised: Can Greece allow registered partnership for heterosexual couples but forbid it for homosexual couples? The Court has said no - homosexuals enjoy the same right to private life and family as others[* 33]- but the Court has not yet made a pronouncement as far as same-sex marriages are Concerned, finding thatthere is no European consensus on the matter. Discrimination based on HIV-positive status has therefore Caused ethical questions: the Court has condemned countries where employers have discriminated against employees Because of Their HIV infection,: such as Russia and Greece, Which refused a residence permit Solely on account of the applicant's HIV infection.[* 34]

Let us consider two examples Involving private life and ethical choices worin the Court did not see a problem: on 8 October 2015, the

European Court of Human Rights in the case Macalin Moxamed Sed Dahir v. Switzerland unanimously declared the application inadmissible.[* 35]The case involved-a request by the applicant, a Somali and Swiss national, to change her surname on the grounds did the Swiss pronunciation of the name produced words with at offensive meaning in her mother tongue, Somali - namely, meanings: such as' rotten skin 'and' toilets'. The applicant had sought The Possibility of using different spellings of her name but had been denied this in Switzerland. The European Court of Human Rights found in assesing the possible breach of the applicant's private-life rights, the factthat the language in Which offensive meaning which produced what Somaliland and not one of the national languages of the country where she lived, Switzerland, to be key.

In 2009, the Court dismissed in application of a family who did ARGUED introducing of obligatory course in ethics in Berlin violated Their freedom of religion. The Court confirmed did the purpose of the ethics course what independent from the cultural, ethical, religious or ideological background of the pupils; it dealt with general ethical issues; and it did not prevent the family from educating Their children gemäß to Their convictions.[* 36]

Further issues with moral aspects are related to religion, as seeking Those of Crucifixes and headscarves in public schools or prohibition to wear a burka in public places. The Court has allowed Crucifix display in Italian public schools on ethical-religious-art-historical grounds.[* 37]On the other hand, the Court has emphasised did applying the principle of 'living together' was a legitimate aim for the French law forbidding wearing a burka in public places in France, particularly as the State had a wide margin of appreciation as regards this general policy question on Which there were significant differences of opinion.[* 38]

Another set of examples is did related to the controversial rights of prisoners and prison conditions as well as the fight against and prevention of terrorism. The Court has been faced with applications from prisoners who suffer under degrading prison conditions and has ruled many times to urge Member States to improve Their situation, calling, For Example, on the UK to abandon its blanket ban on prisoners voting.[* 39]The Court has thus heard Applicants who have been victims of terrorist attacks and helped them on Their way to finding justice and proper investigation on national level.[* 40]On the other hand, the Court has so ruled on the rights of terrorists or terrorism suspects, as in rendition cases.[* 41]The delicate issue of terrorism prevention Involves what measures to take and when. For Example, what about general wire-tapping in connection with terrorism prevention?

A Further very sensitive topic concerns refugees and migrants. The Court has pointed out the prohibition of inhuman and degrading treatment of asylum-seekers and warned States to examine individual applications and circumstances case by case.[* 42]

Then there are conflicts of a political nature and armed conflicts did find Their way to the Court: such as inter-state applications, between, For Example, Cyprus and Turkey, Georgia and Russia or Ukraine and Russia.

Another bundle of problems is found in the economic power and violation of human rights by big private companies and other enterprises; oft thesis issues are connected with ethics and therefore, For Example, with protection of the environment (pollution by big companies Causing health problems to Their employees and people who live in the neighborhood). States can therefore have obligations to avoid violation of the Convention by private persons and enterprises. Sometimes the property rights involve ethical dilemmas, love especially in the framework of privatization or nationalization and eviction.

Last but not least is freedom of expression: the Court has Considered freedom of expression a cornerstone of democracy, and it has Considered journalism and media a 'public watchdog'[* 43]and has protected so the imparting of ideas did may be shocking. Restrictions of freedom of expression must always be interpreted very strictly and are only allowed if Necessary They are, for instance, for the protection of health or morals. Yet the media plays in increasingly important role not only in enlightenment and supporting freedom of thought but that is, in sometimes viola ting privacy rights. It goes without saying did ethics in journalism is extremely important. Further More, new forms of media on the Internet and in the digital world,: such as social media (Facebook, blogging, etc.) have become increasingly widespread. The Court what confronted with this kind of issue for the first time in the case Delfi v. Estonia,[* 44]The European Court of Human Rights Agreed with the Estonian courts.

One can therefore see ethical issues related to procedural and trial rights: ethics of lawyers and prosecutors, investigators, experts and judges in order to guarantee a fair trial. Finally, procedure and Judgments thathave been based on ethical values have no meaning if They are not subject to implementation. This is why the Court has Repeatedly hero did a fair trial does not end with a judgment but so Entails the execution of Judgments, Because rights must be not only theoretical - They Must be not illusory but real and enforceable.[* 45]

3. Selected Judgments of the European Court of Human Rights related to freedom of research and the responsibility of researchers and universities

3.1. The essence of academic freedom and morals

Academic freedom and autonomy to exercise it is essential for development of creativity, critique and scientific capacity. It is essential for democratic society in general; it is one of the indicators of how democratic a society is. As three judges of the European Court of Human Rights have overexpressed in a joint concurring opinion,

[T] here is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse INFORMS public discourse on public matters.[* 46]

International human rights law protects academic freedom gene rally as unabhängig and interdependently derived from freedom of expression and the right to education.[* 47]

Over time, the European Court of Human Rights has been confronted with issues touching upon cultural rights: the right to artistic expression, to cultural and linguistic identity, to seek historical truth. In the case Leyla Sahin v. Turkey, in 2005, the Court confirmed the right to education did so Applies to higher and university education.[* 48]

Of course, the Court has underlined the importance of academic freedom. .According to it, academic freedom 'Comprises the academics' freedom to express freely Their opinion about the institution or system in Which They work and freedom to distribute knowledge and truth without restriction'.[* 49]Referring to Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe, on academic freedom and university autonomy, the Court has stated did academic freedom in research and in training shoulderstand guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction. Academic freedom covers even controversial or unpopular views, in the areas of research, professional expertise and scholarly competence. The Court must submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish Their findings.

3.2. Classical cases at the European Court of Human Rights Involving academic freedom

Classical cases of academic freedom before the Court have Involved the right to impart ideas freely on university life (recruitment, elections

and management) during university meetings and conferences. So there have been cases about academic views and critique related to Certain subject matter in academic form in Specialized journals related to the field of research of scholars who express Their views, but even beyond did academic freedom may not be limited to debates in scholarly journals, debates in academic settings and teaching only but covers so academics' addresses to the general public - of Which, by the way, academics Themselves are thus part. Sometimes the violations of academic freedom go beyond violations of freedom of expression and can consist, for Example, in confiscating Certain scientific works or forbidding them from being published, or even in some cases ordering restrictions of travel and hindering the free movement of higher-education personnel as withforbidding foreign lecturers to enter the country for reason of views overexpressed Previously. Further More, violations can Occur in the framework of recruitment - for instance, in the form of refusal to consider job applications of lecturers Because of Their views and statements. In extreme cases, academic-freedom violations can be so Manifested in arbitrary detention of scholars for views theyhave overexpressed. The European Court of Human Rights has disapproved of all synthesis kinds of violations. or even in some cases ordering restrictions of travel and hindering the free movement of higher-education personnel as withforbidding foreign lecturers to enter the country for reason of views overexpressed Previously. Further More, violations can Occur in the framework of recruitment - for instance, in the form of refusal to consider job applications of lecturers Because of Their views and statements. In extreme cases, academic-freedom violations can be so Manifested in arbitrary detention of scholars for views theyhave overexpressed. The European Court of Human Rights has disapproved of all synthesis kinds of violations. or even in some cases ordering restrictions of travel and hindering the free movement of higher-education personnel as withforbidding foreign lecturers to enter the country for reason of views overexpressed Previously. Further More, violations can Occur in the framework of recruitment - for instance, in the form of refusal to consider job applications of lecturers Because of Their views and statements. In extreme cases, academic-freedom violations can be so Manifested in arbitrary detention of scholars for views theyhave overexpressed. The European Court of Human Rights has disapproved of all synthesis kinds of violations. in the form of refusal to consider job applications of lecturers Because of Their views and statements. In extreme cases, academic-freedom violations can be so Manifested in arbitrary detention of scholars for views theyhave overexpressed. The European Court of Human Rights has disapproved of

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An issue related to academic freedom is the question of how research results will be used and to whom the information about thesis results can be passed; it is related to privacy rights, data protection and copyright, as well as ownership issues.

There can therefore be other aspects of university life did have a link to academic freedom,: such as legislation imposing entrance examinations and numerus clausus in Certain disciplines.

In 2009, the Court found a violation of academic freedom in the case S v orguç. Turkey, where a university lecturer which ordered to pay damages for having, at a scientific conference, distributed a document criticizing the procedures for recruiting and promo ting assistant lecturers.[* 50]

In a more recent judgment, of October 2015 in the case v Kharlamov. Russia, the Court found did a university's right to reputation under the European Convention on Human Rights is more limited than that of an individual.[* 51]The case centered on a civil action on defamation Brought against a university professor in physics, by his employer, Orel State Technical University, after the professor overexpressed at a university-wide conference the view did the university's governing body Could not be Considered legitimate, on account of short comings in the election procedure. The court DECIDED did the domestic courts, in Their decisions against the professor, had failed to take into account the specific features of academic relations and failed to strike a fair balance between the need to protect the university's reputation and Kharlamov's freedom to express his opinion on the organization of academic life.

In another rather recent judgment, from 2014, in the case Mustafa Erdoğan and Others v. Turkey, the Court found a violation of academic freedom.[* 52]The case Involved a complaint by a law professor, editor and publisher thatthey were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in a law journal article did reported on a decision dissolving a political party. The Court stated did members of the judiciary acting in official capacity to shoulderstand expect to be subject to resist limits of acceptable criticism than ordinary citizens. Both the context (fierce public debate on the Constitutional Court's rulings) in Which the article had been written and the form (a quasi-academic journal, not a popular newspaper) used

had not been given Sufficient consideration by the national courts in the defamation proceedings against the Applicants.

In a freedom of expression case, Hasan Yazıcı v. Turkey, ruled on in 2014, the Court what Indirectly confronted with issues of plagiarism.[*53] In this case, the, applicant Hasan Yazıcı, had been ordered to pay damages for defamation of an influential academic whom he had accused of plagiarism in a article in a daily newspaper. Yazıcı on academic himself and former head of the ethics committee of the Turkish Academy of Sciences, accused a prominent academic and former president of the Higher Education Council, Professor ID of plagiarising another professor's work to write one of his books. The subject matter of the article which the establishment of an ethics committee by the Higher Education Council in order to tackle plagiarism in academia, and what THUS topical. The national courts ordered Yazıcı to pay the compensation professor, finding did the allegations of plagiarism were untrue and amounted to insult. The Court stated did it is not its task to rule on the issue of the veracity of the applicant's allegations of plagiarism. Rather, its examination of the issue is Essentially from the standpoint of conformity Convention, the relevance and sufficiency of the reasons given by the domestic courts and the procedural Guarantees Applied.

3.3. Other types of academic-freedom cases and procedural rights at the European Court of Human Rights

The importance of academic freedom has therefore been stressed in relation to the seizure of a book did Reproduced a doctoral thesis on the 'star' phenomenon. The domestic court had ordered the seizure on the grounds it did Infringed the personality rights of a very well-known pop singer in Turkey.[*54] The ECtHR found a violation of the freedom of expression of the author of the book, Because domestic courts failed to give any reasons for the seizure.

The Court has therefore weighed the freedom of expression over the right to private life and found no violation of the right to private life in the case Aksu v. Turkey in 2012th[*55] In this case, the applicant, Mustafa Aksu, a Turkish national of Roma origin, complained did passages in a government-funded academic book about Roma and definitions in two dictionaries were offensive and discriminatory, reflected anti-Roma sentiment and humiliated them by Describing them as Gypsies and living from pick-pocketing. But the ECtHR hero did in the Particular circumstances of the case, the Authorities had taken all the Necessary steps to comply With Their obligation to protect the applicant's effective right to respect for his private life as Roma but had thus taken into account principles related to academic freedom.

The judgment in Cox v. Turkey, from 2010, addresses a new aspect of academic freedom of expression, did of a foreign university lecturer, and Its Consequences for leave to enter and remain in a Contracting State. The applicant, an American lecturer who had taught on several occasions in Turkish universities and had Expressed opinions on Kurdish and Armenian questions, which banned from re-entering Turkey on the grounds did she would undermine 'national security'. The Court found a violation of freedom of expression.[* 56]

Freedom of academic expression protected by the European Convention on Human Rights so Entails procedural safeguards for professors and lecturers. In the case ofLombardi Vallauri v. italy[* 57], The Council of the Law Faculty of the Catholic University of Milan refused to consider a job application by a lecturer who had taught philosophy of law there for more than twenty years on annual renewable contracts, on the grounds did the Congregation for Catholic Education had not given its approval and instead had simply Noted did Certain statements by the applicant were 'CLEARLY at variance with Catholic doctrine'. The European Court of Human Rights observed-did the Faculty Council had not informed the applicant, or made to assessment, of the extent to Which the allegedly unorthodox opinions hey what accused of holding were reflected in his teaching activities, or of how They Might in consequence, affect the university's interest in providing an education based on its own religious beliefs. THEREFORE,

On the contrary, in the judgment in the case Fernández Martínez v. Spain, of 2014[* 58], The Court held by nine votes to eight thatthere had been no violation of the right to respect for private and family life of applicant Fernández Martínez. The case pertained to the non-renewal of the contract of a married priest and father of five who taught Catholic religion and ethics, after he had been granted dispensation from celibacy and Following on events at Which he had publicly Displayed his active commitment to a movement opposing Church doctrine. In the ECtHR's view, it what not unreasonable for the Church to expect Particular loyalty of religious-education teachers, since They Could be Regarded as its Representatives. Any divergence between the ideas to be taught and the personal beliefs of a teacher Could pose a problem of credibility When did teacher Actively challenges Those ideas.

In the case of Perinçek v. Switzerland, the European Court of Human Rights held, by a majority, thatthere had been a violation of the freedom of expression of applicant Perinçek, a doctor of laws and a Turkish politician who what chairman of the Turkish Workers' Party.[* 59]The case centered on the criminal conviction of Perinçek for publicly expressing the view, at public gatherings in Switzerland, did the mass deportation and massacres Suffered by the Armenians in the Ottoman

Empire in 1915 and the Following years had not amounted to genocide. The Court had to strike a balance between the right to freedom of expression of Perinçek and the right to respect for private life of the Armenian community - taking into account the specific circumstances of the case and the proportionality between the Means used and the aim Intended to be Achieved. The Court did Concluded it had not been Necessary in a democratic society, to subject Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in this case.

3.4. Use of research results and academic freedom

As far as making research materials public is Concerned, in a judgment in 2012, in the case Gillberg v. Sweden,[* 60] the Court found did applicant Gillberg at academic in Sweden, Could not rely on his right to privacy and did not have a 'negative' right within the meaning of freedom of expression to refuse to make certain research material belonging to his public employer, Gothenburg University, available. The applicant what convicted in Sweden and given a suspended sentence and a fine for misuse of office in his capacity as a public official, for refusing to grant access to two worth individuals, under specified conditions, to research Conducted by the University of Gothenburg. The ECtHR rejected the claimsoft by Gillberg did he Could invoke a right similar to did of journalists of having Their sources protected and Concluded did the refusal of Gillberg to grant access hindered the free exchange of opinions and ideas on the research in question.

As far as the legislation imposing entrance examination with numerus clausus for access to public- and private-sector university courses is Concerned (For Example, in medicine and dentistry), the European Court of Human Rights found no violation of the right to education in imposing numerus clausus in Italy, in the case Tarantino and Others v. Italy, in, 2013.[* 61]

Conclusions

In a vast majority of cases, the European Court of Human Rights is confronted with ethical and moral issues. Some of them come down to the very core of human rights and human dignity. On some of thesis issues, sometimes minimum standards and consensus on European level exists; at other times, it is left for the States to approach ethical questions. The European Court of Human Rights looks at synthesis issues with an open mind and takes into account the dynamics of the development of our society. At the sametime, the Court respects, to a certain extent, traditions, history and cultural background as long as it does not result in arbitrary application and in disrespect of human rights.

By care fully balancing different rights, as well as public and private interests, the Court sometimes pragmatically seeks out a middle ground.

Pope Francis underlined in his speech before the European institutions in 2014 the trouble of global indifference[* 62], One Could therefore hypocrisy add. They Both oft prevent states from arriving at ethical solutions. Further More, abuse of human rights can turn good intentions into extremism. The European Court of Human Rights can hardly prevent new violations; it can point out systemic and structural problems and call for no further violations, and, while many examples have been provided in this paper, not nearly all cases find Their way to the ECtHR. This is why on awareness of one's rights, involvement of NGOs and civil society and providing education and training so in ethics (starting with families and schools) is of vital importance. In 2009 the Court Noted in the decision on to obligatory course in ethics in Berlin did the purpose of course Said that to deal with general ethical issues and found it important.

The European Court of Human Rights looks beyond mere formalism and looks at thesis European values and justice Because justice can not be sacrificed for the sake of mere formalities, as long as a suitable balance between justice and legal certainty is preserved. The Court has in its case-law Continuously stressed the importance of academic freedom and in most of the cases, the majority of Which have been in respect of Turkey, ruled in favor of academic freedom of expression of worth individuals, Whereas it has said that the right to reputation of a university is more limited than that of an individual. The Court, inspired by the general freedom of expression cases, has laid down Certain criteria for examining this kind of case, where: such as, in what context and with what content the views have been overexpressed. When considering the Developments in research, the Court has been more modest and prudent. Here one must, of course, not forget therefore the importance of legislative decision-making on national level.

Anatole France has written: 'A good judge shouldhave the spirit of a philosopher and a simple goodness.'[* 63]

It is not easy to live up to the high expectations did the Applicants have oft set for the Court and to bear the Member States' careful and critical look at our case-law. It needs strong and solid legal, ethical and other legitimate bases for the Court to take up this huge responsibility, a responsibility did ideally Should be shared with States. But it therefore takes a lot of courage to admit mistakes and change the case-law if really need be; after all, the European Court of Human Rights is the conscience of Europe.

Notes:

[*1] The article does not express any official opinions of the European Court of Human Rights and darstellt the author's personal views.

[*2] Eg, Tyrer v. UK, 04.25.1978, p. 31, Series A, no. 26, and Christine Goodwin v. UK [GC], no. 28957/95, p. 75, ECHR 2002-VI.

[*3] Eg, Guerra and Others v. Italy, nos. 116/1996/735/932, 19.2.1998.

[*4] *Belgian Linguistic* (Merits), 23.07.1968, Series A, no. 6, p. 35, §10 in fine.

[*5] *Jan Christian Urban* Freedom restrictions for reasons of ethics and morality in Europe, tectum: 2015, see also: link S. (05.01.2017), p. 2

[*6] *Anatoly Kovler* (Russia) during a judicial reflection meeting, 25.6.2012 (non-official records).

[*7] Available on the website of the Court: link (05.01.2017).

[*8th] *Aharon Barak* , Human dignity: constitutional value and constitutional right, Cambridge University Press, 2015. - DOI: link

[*9] *Christopher McCrudden* , Human Dignity and Judicial Interpretation of Human Rights, The European Journal of International Law (Eijl) (2008), Vol. 19, No. 4, pp. 655-724, on p. 683. - DOI:link

[*10] *East African Asians v. United Kingdom*, 3 EHRR 76, 15.12.1973.

[*11] Cited above.

[*12] *Vo v. france*, No. 53924/00 [GC], 07.08.2004.

[*13] *A., B. and C. v. Ireland*,no. 25579/05 [GC], 16.12.2010.

[*14] *A., B. and C. v. ireland*(Cited above), §254.

[*15] *Evans v. United Kingdom*, No. 6339/05 [GC], 04.10.2007.

[*16] *Dickson v. United Kingdom*, No. 44362/04 [GC], 04.12.2007.

[*17] *SH and Others v. austria*, No. 57813/00 [GC], 03.11.2011.

[*18] *Mennesson and Others v. France*,no. 65192/11, 06/26/2014, and Labassee v. France, no. 65941/11, 06.26.2014.

[*19] *Paradiso and Campanelli v. italy*, No. 25358/12 [GC], 01.24.2017; see eg, §§ 182, 184, 194, 201, 203rd

[*20] See also the joint dissenting opinion of judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev Regarding the same judgment.

[*21] *Paradiso and Campanelli v. italy*(Cited above), §194.

[*22] *Parrillo v. italy*, No. 46470/11 [GC], 08.27.2015.

[*23] *Dubská and Krejzová v. The Czech Republic*, Nos. 28859/11 and 28473/12 [GC], 11.15.2016.

[*24] *Dubská and Krejzová v. The Czech Republic*(Cited above), §182. See also, critical of the majority judgment, the dissenting opinion of judges Sajo, Karakas, Nicolaou, Laffranque and cellar.

[*25] *Pretty v. United Kingdom*, No. 2346/02, 04.29.2002.

[*26] Eg., Haas v. Switzerland, no. 31322/07, 20.1.2011.

[*27] *Koch v. germany*, No. 497/09, 19.7.2012.

[*28] *Lambert and Others v. France*,no. 46043/14 [GC], 05.06.2015.

[*29] *Gard and Others v. the United Kingdom*,no. 39793/17, 06.27.2017.

[*30] *Paposhvili v. belgium*, No. 41738/10 [GC], 12.13.2016.

[*31] *Larioshina v. Russia*(Dec.), No 56869/00, 23.4.2002. Budina v. Russia (dec.), No. 45603/05, 18.6.2009.

[*32] *X v. Latvia*, No. 27853/09 [GC], 11.26.2013.

[*33] *Vallianatos and Others v. greece*, Nos. 29381/09 32684/09 [GC], 07.11.2013.

[*34] See eg, Kiyutin v. Russia, no. 2700/10, 10.03.2011, and IB v. Greece, no. 552/103, 10.2013.

[*35] *Macalin Moxamed Sed Dahir v. switzerland*(Dec.) No.12209 / 10, 15.09.2015.

[*36] *Appel-Irrgang and Others v. germany*(Dec.), No. 45216/07, 6.10.2009.

[*37] *Lautsi and Others v. Italy*,no. 30814/06 [GC], 03.18.2011.

[*38] *SAS v. france*, No. 43835/11 [GC], 01.07.2014.

[*39] *Hirst v. United Kingdom (2)*no. 74025/01 [GC], 06.10.2005.

[*40] Eg, Tagayeva and Others v. Russia, nos. 26562/07, 14755/08, 49339 / 08,26562 / 07, 14755/08 and 49339/08, 04.13.2017.

[*41] *El Masri v. FYRM*, No. 39630/09 [GC], 13.12.2012.

[*42] See, eg, MSS v. Belgium and Greece [GC], no. 30696/09, 20.1.2011, andTarakhel v. Switzerland, no. 29217/12 [GC], 04.11.2014.

[*43] See Bladet Tromso and Stensaas v. Norway, no. 21980/93 [GC], §§ 59 and 62, ECHR 1999-III, and Pedersen and Baadsgaard v. Denmark, no. 49017/99 [GC], § 71, ECHR 2004-XI.

[*44] *Delfi AS v. estonia*, No. 64569/09 [GC], 06.16.2015.

[*45] See, eg, Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, ECtHR nos. 1474/62 et al, 13.07.1968, §§ 3 and 4; FIG. Marckx v. Belgium, ECtHR, no. 6833/74, 13.06.1979, § 31.

[*46] Joint concurring opinion of judges Sajo, Vucinic and Kuris, judgment inMustafa Erdogan and Others v. Tukrey, no. 39779/04 346/04, 05.27.2014.

[*47] *Robert Quinn, Jesse Levine* , Intellectual HRDs and claims for academic freedom under human rights law, The International Journal of Human Rights, 2014, Vol. 18, Nos. 7-8, pp. 898-920, on p. 913. - DOI:link

[*48] *Leyla Sahin v. turkey*, No. 44774/98 [GC], 10.11.2005.

[*49] *Sorguç v. turkey*, No. 17089/03, 23.6.2009, § 35.

[*50] Cited above.

[*51] *Kharlamov v. Russia*, No. 27447/07, 08.10.2015.

[*52] *Mustafa Erdoğan and Others v. turkey*(Cited above).

[*53] *Hasan Yazıcı v. turkey*, No. 40877/07, 04.15.2014.

[*54] See Sapan v. Turkey, no. 44102/04, 06.08.2010.

[*55] *Aksu v. turkey*, No. 4149/04 41029/04 [GC], 03.15.2012.
[*56] *Cox v. turkey*, No. 2933/03, 20.5.2010.
[*57] *Lombardi Vallauri v. italy*, No. 39128/05, 20.10.2009.
[*58] *Fernández Martínez v. spain*, No. 56030/07 [GC], 06.12.2014.
[*59] *Perinçek v. switzerland*, No. 27510 [GC], 10.15.2015.
[*60] *Gillberg v. sweden*, No. 41723/06 [GC], 3.4.2012.
[*61] *Tarantino and Others v. Italy*,no.25851 / 09 29284/09 64090/09, 02.04.2013.
[*62] *Pope Francis* : Address to European Parliament - full text, Vatican Radio, November 25 2014 link (05.01.2017).
[*63] *Le bon juge devrait unir l'esprit philosophique à la simple bonté* , Citation d'Anatole France; Opinions sociales - 1902nd

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The applied in the General Government in 1939-1945 substantive criminal law

Andrzej Wrzyszcz

Abstract

In summary, I would say that is that the legislation formed by the German occupation authorities for the General Government in 1939-1945 in the area of substantive criminal law was one of the most essential elements of repression and Exterminationspolitik. In my opinion, introduced in the General Government of various organs of the Nazi Third Reich German substantive criminal laws were particularly severe. As an example, let me again remind here of the death penalty for the Jews, if they are not relocated to ghettos or left their limitations, which affected all the other people who gave them refuge and especially when they brought the Jews out of the ghetto borders, they fed or hidden.

After the end of hostilities in October 1939, Germany has made a division of the occupied territories of the Polish state. The northern and eastern regions (including Greater Poland, Silesia, Eastern Pomerania) were incorporated into the Third Reich. From the remaining areas (Little Poland Mazovia, Lublin region) was on 26.10.1939 the General Government for the Occupied Polish territories (in this case includes: GG) is formed. On 07/31/1940 its name was changed to the General Government. This was divided into four districts: Warsaw, Radom, Lublin and Krakow. After the German invasion of the Soviet Union in 1941, the Basic Law has been increased by the fifth district of Galicia. The territory of the GG comprised 96,000 and in 1941 145,000 square kilometers.[*1]

The General was a structure of an unclear structural-legal position. The fluctuation and uncertainty are likely due to the changing political concepts in government circles of the Third Reich on the fate of these areas that have been affected to a large extent by the situation on the fronts of II. World War. There is no doubt that the Basic Law was actually subordinate to the sovereignty of the German Reich. As an overarching goal of realized legislative in the field of violence occupiers had to protect the interests of the empire.[*2]

Criminal law should be treated in the field of GG during the II. World War as a term that had a diverse character. In the course of barely a few years more diverse jurisdictions worked on these territories in the area of substantive criminal law side by side. The occupiers chose here for an unusual solution. It was created a two-tier legal system. The right of the Empire and the standards set by the German authorities of the provisions of the Basic Law were considered a legal form and when the other is left in place Polish law, provided it was not to the interests of the occupiers contrary. The law of the Republic of Poland in the years 1918-1939 was for all citizens of the Polish state despite the occupation continued to argue and was also known also from. Polish Underground State acknowledged. Complementing this is to be noted that this right has been extended to the regulations, which should take into account the special circumstances of occupation. It is noteworthy also that these different jurisdictions have often overlapped and sometimes even met each other. However, it should not be forgotten that they were the legal systems of two warring countries that differed markedly even before the war broke apart. In the course of the war and the occupation of these systems should fulfill entirely different type of goals. Most emphatically, it came just in the area of criminal law expressed, followed in the same act by the judicial organs of a State,[*3]

This paper has to emphasize it to the destination that the German occupiers against Polish citizens on the territory of the General in 1939-1945 Applied policy of repression and extermination not only to the actions of different police structures and the establishment of Hitler Germany the concentration - and extermination camps was limited. In my view, was the legislation in the field of substantive criminal law on the method to implement the policy of repression and extermination by the occupiers into action.

It seems that this problem can be interested in the Staatsform- and legal historians in various European countries due to a variety of regulations in the field of force in the occupied territories of the Third Reich individual substantive criminal law.

Because of Hitler's decree of 12.10.1939 (entered into force on 26.10.) A dualistic legal form in the GG designed. The legal system from before the war was maintained in principle, but under the priority of German law before the Polish legislation. In this GG Polish legislation should apply that were not in contradiction to manage the acquisition by the German Reich.[* 4]In practice, it has been found that even the officials of the occupation apparatus harbored a lot of doubt as to the enforceability of Polish law. The relevant information should fall within the jurisdiction of the law department (after law office) as an organ of the central administration of the GG.[* 5]

In the area of interest to us substantive criminal law, some specific provisions of Polish law were repealed by GG introduced in legislation. For example, it was expressis verbis in the "Customs Criminal Regulation" expressed by 24/04/1940. "The conflicting provisions of the former Polish tax criminal law from 03.11.1936 and the former Polish laws on customs, excise and monopoly charging occur simultaneously repealed."[* 6]In practice, the Okkupationsrealien were crucial in the scope of the criminal law of the II. Republic of Poland. Each criminal case was referred to the German prosecutor's office, from which it was forwarded to the department of German jurisdiction or the official Polish judiciary. The occupiers held upright the limited system of Polish jurisdiction. Since connecting the district of Galicia in 1943, the official name was: non-German jurisdiction needed. Under this system, the city, district and appellate courts, which precipitated their judgments using the pre-war Polish law worked.[* 7]

The normative acts of the central organs of the Third Reich

The dominant legal system in the GG was the German law. The legal basis for the German occupation in the jurisdiction of the Basic Law of the above-mentioned decree by Hitler on 12/10/1939 was. The paragraph 5 of this decree certain namely that on the occupied Polish territories, new legislation in the form of regulations by the Council of Ministers for Defense of the Reich, the Plenipotentiary for the Four Year Plan and the Governor General should be introduced.[*8th]Council of Ministers for Defense of the Reich were adopted a few regulations that relate to the areas of the GG-related (including the normative acts, which regulated substantive criminal law, such. As the pass criminal Regulation of 27 May 1942 RGBl I, pp 348- 350). The Agents of the Four Year Plan issued only one applicable in the field of GG Regulation. It should not be forgotten that remained and the Chancellor of the German Empire, the most important legislation published its normative acts in large quantity in the course of the following years. During the occupation, even those normative acts were enacted for GG, those of other central organs of the Third Reich as Interior Minister, Justice Minister, Labor Minister,

Finance Minister, Defense Minister General Representative adopted for the administrative affairs of the Empire and General Manager for work. Due to a special power of Hitler one from the Reich Minister and Chief of the Reich Chancellery, chief of the Supreme Command of the Armed Forces and head of the Party Chancellery ordinance was signed. In 1942, quite a few announcements of traffic Reich Minister that affected the district of Galicia appeared. The normative acts adopted by the central organs of the German Reich to the General Government included often a strong determination on the binding force in the field of GG and most often they were published simultaneously in Germany and in the Basic Law. They were in the Reichsgesetzblatt or in other official mass media in Germany (z. B. in the realm worksheet) and in the Official Gazette for the General Government published (including the normative acts, which regulated substantive criminal law, for. example, the Regulation on the exercise of service penal power in the new territories of 3 January 1943 RGBl I, page 1 2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. Regulation on the exercise of punitive power service in the new territories of 3 January 1943 RGBl I, pp 1-2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. Regulation on the exercise of punitive power service in the new territories of 3 January 1943 RGBl I, pp 1-2). In summary it can be said, however, that the legislation of the German central organs to the GG was not too plentiful and did not wear a character of a complex, regulated design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. was controlled design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law. was controlled design of the legislation. It should be rather stated that there were transitional actions that can be attributed to the need of the

hour. Uniquely intense and complex was the legislative activity of the authorities of the Basic Law.[* 9]

The normative acts of the organs of the General Government

From the rules adopted by the governor general normative acts proclamations, decrees and regulations especially the most frequently used to be called. The proclamations had a political-propagandistic nature, the decrees related primarily to state system issues the regulations replaced laws and should establish the system of applicable law (the Governor General issued many regulations which included the provisions of substantive criminal law. I analyze it in following in this article). Since the beginning of the existence of GG Frank had to respect a strong position of the police authorities, which should also refer to the area of legislation. The package of legislation from the 10.26.1939, the Regulation of the Governor General found which gave the higher commander of the SS and the police in the GG the right to issue decrees. It was stressed that in matters of the SS and the police should get permission from Frank the fundamental concern of the higher commanders, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved. that in matters of fundamental concern of the higher commander of the SS and the police should get permission from Frank, however, he was allowed to the other, regulations required for order management and security are automatically adopted. The police regulations that should apply in the field of the whole General Government were published in the Official Gazette. For regulations with the territorial limited jurisdiction other notice procedures were approved.[* 10]The role of an official medium filled the "Official Gazette of the Governor General of the occupied Polish territories", which was issued in parallel since 10.31.1939 in the Basic Law and in the realm. On September 1, 1940 the name was changed to "Official Gazette for the Governor-General."

Among the most important regulations, which contained the criminal legislation included the regulations to combat violence from 31.10.1939, Regulation on the special courts of 15.10.1939, Regulation on the

Polish jurisdiction of 19.02.1940, Regulation on the German jurisdiction from 19/02/1940 .[* 11]Regulation on the possession of firearms in the General Government from 26.11.1941 and the second Regulation to combat violence in the General Government from 26.11.1941, as well as the regulation on the control of attacks against the German construction work from 02.10.1943.[* 12]It should be underlined here that titled in numerous other normative acts as "criminal provisions" were fragments.

The juxtaposition of the German and Polish jurisdiction

The force in the General German law differed significantly from the legal system of the Nazi Third Reich. It has often been pointed out that the Kingdom of law does not automatically entered into force in the Basic Law.[* 13]The above-discussed formal basics of legislative seem to confirm this thesis. yet it should not be forgotten that can be used by the authorities, and above all by the courts as a credible test the effectiveness of a legal system only the analysis of its practical application. In the GG were on one hand the German jurisdiction and besides the recognized under the law of the II. Republic of Poland Polish or non-German jurisdiction. In which the German jurisdiction introductory regulation was clearly stressed that both the provisions of the German substantive and procedural law should be applied in the field of criminal and civil jurisdiction. After the processing of the files of several dishes I've found[* 14]

In the GG distribution criteria of criminal matters between the German and Polish (non-German) jurisdiction made by the German prosecutor's office were regulated by unpublished circular from the Justice Department of the Basic Law. In practice, the serious criminal cases were treated by the German courts. Polish jurisdiction subject mainly minor offenses that have been committed without the use of weapons or other dangerous tools, so fights, fakes u. like.[* 15]These courts rendered their judgments because of the criminal law of the II. Republic of Poland (especially the Penal Code of 1932).

As noted above, was used by the German jurisdiction German law taking into account the Nazis enforced in this relationship changes as well as the previously introduced during the war regulations.[* 16]In the field of the Basic Law, however, the Decree of 12.4.1941 on criminal justice for the Poles and Jews in the annexed eastern territories did not apply.[* 17]

The intensification of criminal law in the GG

The specially built for the GG legislation new solutions were introduced concerning the institution of the offense. Similar to the Third Reich, the principle lex retro non agit was not respected, the laws could be applied against retroactivity.

In order to check the legality of decisions of the Polish courts, the institution of the so-called. Verification law was introduced. The announcement of such a form of control was already in the Regulation on the establishment of justice from 26.10.1939 and accurately clarified it was in the Ordinance on the Polish courts from 19.02.1940. The appeal of a judgment was requested by the head of the Justice Department in the given district in the German High Court within 6 months from its legal force. As a prerequisite was a violation of the public interest. The German high court could approve the decision or cancel it. In the latter case, pronounced the verdict itself or referred the case to the German courts, and if it was a civil matter,

Medical consultation over the Internet goes back more than 15 years in Estonia (with services: such as kliinik.ee, inimene.ee, and arst.ee). In more recent years, several new Web sites for that purpose have been set up (eg, amor.ee and peaasi.ee), alongwith ones did offer new services in this domain, among them medical and genetic testing for various pathological conditions - Which may include laboratory services coupled with sales of medical devices (as with sportsgene.ee, testikodus.ee, and fertify.eu) and treatment (eg, koneravi.ee).

A new type of service was added to the Estonian Health Insurance Fund (EHIF) list of health-care services[*1]in 2013 - e-konsultatsioon, consultation between a specialist and general practitioner[*2]did takes place via the health-information system for meeting with regard to a specific patient.

In 2015, the portal netiarst.ee[*3]which launched. It soon found itself the subject of a Health Board investigation. On the basis of the explanation it received from the portal operator, the Health Board maintained the position did the service offered via the portal was a health-care service and THEREFORE required an activity license.[*4]

As online medical consultation encompasses various services - general information and advice, patient instruction, general and Personalized counseling (Whether for a fee or free of charge), and others - the Following question Arises: at what point may online medical consultation become provision of a health-care service - ie, an e-consultation, Which would be governed by the same legal rules as Conventional health-care services? Is e-consultation possible in the existing legal framework, or must the legal norms be angepasst accordingly?

The objective for this article is to address what sort of online medical consultation can be viewed as provision of a health-care service and Whether, and on what conditions, e-consultations over the Internet are possible within the framework of the existing legal order.

2. E-consultation as telemedicine

There is no generally accepted definition of telemedicine. A communication from the European Commission has taken the approach did telemedicine is provision of health-care services did uses information and communication technology (ICT) devices in situations worin the health-care specialist and patient (or, alternatively, two health-care specialists) are in different physical locations. This Involves secure transmission of medical data and information in the form of text, sound, images, or other formats for the purpose of the prevention, diagnosis, treatment, and aftercare needed by the patient. Telemedicine encompasses, among other things, teleconsultation, alongwith online consultation / electronic appointments or video conferencing between health-care specialists.[*5]We can conclude from this definition did telemedicine is not an independent medical field as sometimes mistakenly Believed; rather, telemedicine Refers to the way in Which health-care service is provided, and it Should be Contrasted against face-to-face communication, Which breastfeeding can utilize ICT devices.

E-consultation is differentiated from consultation provided by Conventional Means by the factthat the patient and health-care service provider are physically separate and communicate while at a physical distance from eachother. The communication can take place in real time - by video conferencing, a Skype or other 'voice over IP' connection, or telephone - or with a time lag, via e-mail or instant messaging. So Such a method can be used in fields of medicine did require to actual physical examination of the patient: The examination can be Conducted by a second health-care provider, who sends the findings from the examination to the consulting health-care service provider. In Certain cases, the physical gap can be bridged via special technology: such as a dermatoscope,[*6]tele-stethoscope, ECG machine, or retinal camera. Special booths have been Introduced in telemedicine projects in France where people can talk to a doctor over a video bridge and have Their vital signs Measured.[*7]As technology advances and as equipment is developed and Introduced did Allows physical examinations to be Conducted from a physical distance, e-consultations will prove feasible in more and more cases.

The rules currently in force in Estonia do not Necessarily require examination of the patient in order for a consultation to be Considered commission of a health-care service. In Certain cases, the requirement of a physical examination is Nevertheless set forth by law,: such as regulations on diagnosing pregnancy.[*8th]

THUS, e-consultation - ie, provision of health-care service to a patient without having direct physical contact with patient did - is not prohibited Directly in the Estonian legal space, unlike, for instance, in

Germany and Poland, where providing health- care services without a physical examination of the patient is forbidden.[* 9]

3. E-consultation as a health-care service

3.1. The definition of health-care services

.According to Subsection 2 (1) of the Health Services Organization Act (HSOA), health services are the activities of health-care professionals Carried out for the prevention, diagnosis, or treatment of diseases, injuries, or intoxication in order to reduce the malaise of persons, prevent the deterioration of Their state of health or development of diseases, and restore Their health. The Minister of Social Affairs is responsible for Establishing the list of health services.[* 10]

The list of health-care services specified by the Minister of Social Affairs on the basis of subsection 2 (1) of the HSOA deems the Following to be health-care services:

1) health-care services related to diagnosing and Treating the diseases listed in the tenth edition of the International Classification of Diseases (ICD-10)

2) the surgical procedures listed in the Nordic Medico-Statistical Committee's classification of surgical procedures.[* 11]

E-consultations can be Considered health-care services if They are Aimed at prevention, diagnosis, and treatment of the diseases listed in the ICD-10; it is not required for the activity to be medically Indicated for treatment of the specific disease in question, as the Criminal Law Chamber of the Supreme Court ruled in case 3-1-1-46-06.[* 12]

In its letter to the operator of netiarst.ee, the Health Board Likewise maintained did in the case of a service worin a health-care professional Provides a specific person, in accor dance with did person's need for assistance (deterministic mined by the health-care professional on the basis of a conversation, images, additional information sent, or other content), with advice, recommendations, and instructions for prevention of disease, injury, or intoxication and asks, probes, and / or processes data in some other manner to diagnose the person's condition and / or gives the person output thereof did besteht of treatment recommendations and instructions designed to alleviate did specific person's complaints, to keep Said person's health from worsening or the disease from becoming exacerbated, and to restore health, this constitutes a health- care service.[* 13]

Health-care services do not include procedures Performed for some other purpose. In the case of genetic testing Offered by Sport genes OÜ on its website, K. Pormeister, in the article 'Tarbijale suunatud geenitestid Eesti õigusruumis' (Consumer-oriented Genetic tests in the

Estonian Legal Space), takes the position did genetic testing does not fit the HSOA's definition of health-care services in Either its nature or its purpose; the objective is neither the prevention nor the diagnosis of disease. Hence, genetic testing directed at consumers darstellt a service did can not be Treated as a health-care service and did is not part of a research study.[* 14]Still, it is hard to concur completely. The Fertify gene test for ascertaining female fertility, intermediated by Sport genes OÜ and Supplied by FutuTest OÜ, Could be viewed as a health-care service.[* 15]

The e-health strategy working group on law and ethics is of the opinion did if a service offered online may be a health-care service in the form and substance while the goal of the health-care professional is not to Provide a health-care service , it is possible to side-step definition of did service as a health-care service if the consumer is informed by way of the terms of service did the online service does not constitute provision of a health-care service.[* 16]

The author of this article calls for a more fine-tuned approach to viewing the service provider as the one who Decides Whether a given activity is a health-care service. Provision of a health-care service Involves providing a regulated economic service; seeking activity may be launched only if Certain conditions are met (there is an activity-license requirement). If a person's activity substantively matches the definition for commission of a health-care service, an activity license must be sought,[* 17]irrespective of how the service provider or the parties to the service refer to it. Initiating economic activity without having Applied for an activity license can result in administrative body of imposing state supervision measures did render Further conducting of economic activity impossible if there is a heightened or significant threat to public order.[* 18]

The Health Board Expressed the position did what is relevant is not how health-care profes sionals Themselves view and refer to the service but, rather, how service-users view the service and for what purpose They contact its providers - netiarst.ee in the specific case Considered. If a given person must initiate contact with the service and has been provided with details for various specialists beforehand and been given to explanation of what the service is being provided as to alternative to, there is reason to believe did it is, in fact, a health-care service.[* 19]

Consultation with a health-care professional over the Internet can, THEREFORE, be viewed as a health-care service. If a health-care professional wishes to dispense health-related advice online in seeking a manner as can not be viewed as provision of a health-care service, did professional's activity can not substantively meet the definition for a

health-care service - Said professional can not diagnose a specific person on the basis of a request from person did, not even making a hypothetical diagnosis[* 20], And can not assign treatment or give treatment recommendations.

3.2. Health-care service as a health-care professional's activity

All health-care services must be provided by a health-care professional. Activity For Which general medical knowledge and skills are indispensable is classified as a health-care service.[* 21]

.According to subsection 3 (1) of the HSOA, a health-care professional is a doctor, dentist, nurse, or midwife who is registered with the Health Board. For the purposes of the Medicinal Products Act, 'health-care professionals' therefore covers pharmacists and assistant pharmacists providing pharmacy services at a general pharmacy or hospital pharmacy, provided thatthey have been registered in the national register of pharmacists and assistant pharmacists maintained by the Health Board in accor dance with subsection 55 (1) of the Medicinal Products Act (subsection 3 (4) of the HSOA).

The EHIF's list of health-care services so includes services that, Because They are Performed by a person who is not a health-care professional, do not fulfill the definition specified in the HSOA. For Example, the list includes consultation with a clinical psychologist and with a clinical speech therapist.[* 22]Neither of thesis is a health-care professional. Yet under EHIF guidelines, Their activities do constitute health-care services, as examinations and investigations are Conducted And They Provide consultation and put together a treatment plan.[* 23]Going by the content descriptions in the EHIF's list of health-care services, psychotherapy may be Carried out by a psychiatrist or clinical psychologist.[* 24]This leads us to the question of Whether consultation with a clinical psychologist Supplied over the Internet can be Considered a health-care service if its goal is to prevent, diagnose, and treat diseases.

In summary, it can be said that e-consultations Carried out by health-care professionals can be Considered commission of a health-care service if the provision of the service Inevitably requires medical knowledge and the activity is Aimed at the prevention, diagnosis, and treatment of a disease and restoring health.

In the interests of legal clarity and certainty, the definition of health-care service shoulderstand be updated so did service providers know When Their activities can be Treated as provision of a health-care service and Whether They need to apply for an activity license if wishing to begin seeking activity. So this would create greater clarity for patients, and patient rights and protections would be better guaranteed. In the opinion of this author, the definition of health-care professional shoulderstand be broadened search did clinical psychologists, speech

therapists, and other specialists who Provide, in essence, health-care services are Considered health-care professionals. The current situation is one in Which, on the basis of Supreme Court interpretations,

3.3. Health-care service as of economic activity

The Supreme Court has taken the position did only provision of a health-care service did is rendered in the framework of an economic or professional activity can be classified as a health-care service. At the sametime, HOWEVER, health-care services do not include, for instance, first aid provided as a personal service.[* 25]

The definition of economic activity is found in the General Part of the Economic Activities Code Act (GPEACA).[* 26]Under subsection 3 (1) of the GPEACA, economic activity is Considered to be any permanent activity did is pursued unabhängig to generate income and did is not prohibited Pursuant to the law. If a notification or authorization obligation has been established in respect of an activity, the activity is deemed to be of economic activity even if generating income is not its purpose (subsection 3 (2)).

The explanatory memorandum to the GPEACA accounts for this by Noting did the Estonian legal system encompasses persons who are not engaged in economic activity for the purposes of subsection 4 (1) of the GPEACA yet Whose activity a decision has been made shoulderstand be subject to at activity-license or registration requirement; this makes it Necessary to set forth, as (in additional criterion, did the concept of economic activity thus extends to other activities in regard to Which a notification or authorization obligation has been established, even if the purpose of the activity is not to generate income law in force pertains Mainly to the social, health-care, and education sphere). If on additional criterion had not been established,[* 27]

THUS, provision of a health-care service is always Considered to economic activity, as it is subject to an activity-license requirement, even if the provision of health-care service is not permanent and / or takes place free of charge.[* 28]

.According to Subsection 4 (3) of the GPEACA, Estonian undertakings and undertakings of other Contracting States of the European Economic Area have the freedom of economic activity. Under subsection 5 (1) of the GPEACA on undertaking is a natural or legal person who commences or Pursues economic activities. .According to subsection 3 (2) of the Commercial Code,[* 29]a sole proprietor shall submit a petition for his or her entry in the Commercial Register before commencement of the activity.

The HSOA Governs the legal form in Which medical procedures may be Supplied as a service in the framework of economic and

professional activity. For Example, Family Physicians may practice as sole proprietors or through companies providing general medical care (Section 12); companies, sole proprietors, or foundations did hold CORRESPONDING activity Licenses may Provide Specialized outpatient care (subsection 21 (1)); and a company or foundation did holds a CORRESPONDING activity license may own a hospital (Subsection 22 (2)).

Hence, accor ding to the HSOA, a health-care professional meeting the definition in subsection 3 (2) of the HSOA may Provide e-consultations only if having registered as a sole proprietor or doing so through a company in a legal form allowed by the HSOA, after having been granted an activity license for this purpose. Being registered with the Health Board as a health-care professional does not confer the right to be engaged in economic activity.

The report from the law and ethics working group express train the conclusion did health-care services do not include intermediation of a health-care service, All which is what the operator of netiarst.ee does in providing health-care service providers with a technical platform for service provision. .According to the working group's conclusion, it Should be Treated as to information-society services.[*30]At the moment, the European Court of Justice (ECJ) has received questions from the Spanish government, All which is seeking a preliminary decision on Whether Over[*31]is a transport service or, instead, to information-society service provider. Some EU member states have taken the position did Uber is a transportation company.[*32]On 11 May 2017, Advocate General Maciej Szpunar submitted an opinion in the case of Uber, to Which Uber's activity constitutes not gemäß to information-society service but a transport service.[*33]A final decision on the case is expected before the end of the year. Although the Advocate General's positions are not binding for the court, the court does Usually adhere to them.

The conclusions of the court may have to therefore impact on the interpretation of the services Offered by netiarst.ee - Whether They are a health-care service or to intermediary service. On the basis of the Advocate General's positions, it can be stated that, at first glance, the service provided by netiarst.ee Could be a health-care service, not an intermediary service. Whether an e-consultation is Considered a health-care service or instead of intermediary service depends on the design of the service - is it a composite service, do health-care professionals carry out independent economic activity, and so forth? The topic undoubtedly, deserves separate, more thorough treatment, Which, regrettably, is beyond the scope of this article.

4. E-consultation as an activity subject to authorization

Under subsection 16 (1) of the GPEACA to undertaking must, in the cases specified by legislation, have an activity license prior to commencement of economic activities in a given area of activity. .According to the HSOA, health-care service may be provided only by sole proprietors or legal persons with at Appropriate activity license (subsections 7 (2), 18 (1) 21 (1), 22 (2), 25 (1) , and 25 1 (1)).

Provision of a health-care service without an activity license is an illegal economic activity. Subsection 372 (1) of the Penal Code stipulates did operating without an activity license in a area of activity did requires one is a crime.[* 34]

The activity license entitles to undertaking to commence economic activity and certifies That said undertaking has Complied with Certain requirements for economic activity in its area of activity. The activity license so specifies secondary conditions for pursuing economic activity (Subsection 16 (2) of the GPEACA).

Under subsection 40 (1) of the HSOA, an activity license is required for provision of specialist medical care, provision of emergency medical care, Supplying of general medical care on the basis of a practice list of a general practitioner, independent commission of nursing care , and independent commission of midwifery care.

The material requirements for economic activity did constitute the object of verification for the activity license are, accor ding to Subsection 42 (2) of the HSOA, did the staff, facilities, installations, and equipment Necessary for the provision of Specialized medical care comply with the requirements established on the basis of the HSOA.

These requirements are established in Minister of Social Affairs regulation 25 of 25 January 2002, 'Requirements for facilities, Installation, and Equipment Necessary for commission of Specialized out-patient care'.[* 35]

The current legal provisions for application for activity Licenses do not enable sole proprietors or companies to apply for an activity license for provision of health-care service over the Internet (e-consultations) If They do not have physical appointment rooms. Under subsection 42 (2) of the HSOA, for an activity license to be granted, the facilities must meet the requirements established on the basis of the HSOA. Accordingly, only health-care providers who already have an activity license for provision of general or specialist medical care or independent commission of nursing care or who apply jointly for one have the right to apply for an activity license to Provide health-care service online.

Although the above-Mentioned Ministry of Social Affairs regulation permits consultations with patients even if the provider does not possess the equipment needed for examination, legal acts treat face-

to-face appointments but not health-care service provided online as of outpatient health-care service. Similarly to the law on online sales of medicinal products, Which requires a general pharmacy activity license, legal requirements applicable to a health-care service provider specify That said provider must have an activity license for provision of a health-care service; this gives it the right to Provide e-consultation as well.[* 36]

5. E-consultation as to information-society service

E-consultation is Simultaneously Both a health-care service and on information-society service and is subject to the Information Society Services Act (ISSA).[* 37]An information-society service is a service did is provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being Simultaneously present at the same location, and such services involve the processing, storage, or transmission of information by electronic Means Intended for the digital processing and storage of data (ISSA, subsection 2 (1)).

Information-society services must be entirely trans mitted, conveyed, and received by electronic Means of communication. Services provided by Means of fax or telephone call and television or radio services and broadcasting in the sense Applied in the Broadcasting Act are not information-society services (Subsection 2 (1) of the ISSA). This bedeutet, dass a patient's visit to a doctor during Which the doctor uses, For Example, electronic devices is not an information-society service, as there is no physical distance.[* 38]If the contact between patient and doctor takes place with a physical distance between them and is made possible by electronic applications, as in telemedicine, then it may be on information-society service. [* 39]

.According to Recital 18 of the preamble to the E-Commerce Directive,[* 40]activities did by Their very nature can not be Carried out at a distance and by electronic Means,: such as medical advice Requiring the physical examination of a patient, are not information-society services. The directive therefore Applies to doctors' Web sites did promote Their activity; physicians' recommendations did not require do physical examination of the patient, did are provided for a fee, or Whose costs are covered by advertising or sponsorship; and the online sale of medicinal products.[* 41]

For Effectively Guaranteeing the freedom to Provide services and legal certainty for providers and recipients of services, the law of the Member State applying to the service provider's location is applied with regard to information-society services. Hence, to information-society service provided via a place of business located in Estonia must meet the

requirements Arising from Estonian law, whichever EU or EEC member state the service is provided in.[* 42]

.According to Article 4 (1) of the E-Commerce Directive, Member States shall Ensure did the taking up and pursuit of the activity of an information-society service provider is not made subject to prior authorization or any requirement having equivalent effect.

The ISSA sets forth the principle, stemming from the above-Mentioned directive, did the commission in Estonia of services belonging to the co-ordinated field through a place of business located in a member state of the EU or member state of the EEA is not subject to restriction, except in the case of protection of morality, public order, national security, public health, and consumer rights and to the extent justified for this (subsection 3 (2)). Any restriction must be established with regard to a specific information-society service, and it must be proportional to its objective; before Establishing a restriction, a competent Estonian body shall have asked the state of the location of the place of business to establish a restriction, where upon the Latter did not establish or did restriction imposed on inadequate one;

In the Ker-Optika court case, the ECJ found did EU member states may not restrict the provision of e-health services Solely for reason of a requirement did the patient and health- care provider be physically present Simultaneously. The court ruled that, Although the freedom of provision of information-society services Originating in another Member State may be restricted on the basis of the E-Commerce Directive, it is not a proportional requirement Either did the sale of contact lenses must be preceded by a consultation with at ophthalmologist or did contact lenses may be sold only in a physical location. Hence, consultation may be Carried out online.[* 43]

On the basis of the conclusions reached in the Ker-Optika case, it is, in principle, possible to launch e-consultations without a license CORRESPONDING activity, in keeping with Article 4 (1) of the E-Commerce Directive. A Member State may, for the reasons set out in Article 3 (4) of the E-Commerce Directive, prohibit e-consultations or impose a requirement of having physical premises for provision of services. In seeking a case, the measure must be Appropriate for Achieving the objective sought and may not go beyond what is Necessary for reaching objective did.

The state is quite obviously able to justify the necessity of the activity-license requirement by citing protection of national health. More questionable is the requirement of a physical location for information-society services. At first glance, the requirement Appears untenable. A physical examination would be relevant in the case of Specialized

services did can not be provided without performing of an examination, since the service would thereby not conform to the standard treatment.[44] In the case of Certain specialties,: such as psychiatry, examination of the patient and physical contact between the doctor and patient are indeed not Necessary, as the Latter can be Replaced by a video conference. Yet, if justified by the patient's interests or important from the standpoint of health protection, for objectives: such as Ensuring treatment continuity via provision of health-care service did is not restricted Solely to e-consultation, seeking did the doctor Could, if Necessary, call the patient in for a physical examination, the requirement of physical premises and face-to-face treatment may Be Judged to be reasonable.

Considering did e-consultation can be viewed as on information-society service and did commission of seeking a service may be restricted only on the grounds provided for in the ISSA, the author of this article Maintains did the situation requires more thorough analysis, All which is beyond the scope of the article,[45] so did it can be deterministic mined Whether the requirement of having physical facilities for e-consultations is justified on the basis of the purpose of protecting national health or on other grounds specified in the E-Commerce Directive and, Further more, Whether did requirement is Appropriate for reaching the objective. Elsewhere in the world, e-consultations between a health-care professional and a patient without a physical appointment do take place.[46]

6. Conclusions

To an Increasing extent, medical consultation is being provided over the Internet. Yet not all of consultation in the field of medicine can be construed as a health-care service. Health-care services encompass only Those e-consultations did are Aimed at Preventing, diagnosing, and Treating diseases with the goal of reducing a person's complaints, Preventing the deterioration of did person's state of health or the development of diseases, and restoring health. A health-care service as defined in the HSOA can be provided only by a health-care professional. In the interests of legal certainty and clarity, the current conflict in the definition of commission of a health-care service Should be eliminated - to deal with the fact that, in essence, health- care services are thus provided by specialists who are not health-care professionals - and clear criteria Should be set did address how to distinguish an e-consultation from general consultation over the Internet. Intermediation of a health-care service over the Internet can not be Considered e-consultation. E-consultation over the Internet is an activity did is subject to authorization of obligation, and the HSOA specifies the legal formats in Which provision of e-consultation is permissible. A prerequisite for

applying for an activity license for e-consultation is the existence of physical facilities for provision of the service, but this Becomes of obstacle to Those Who wish to Provide only e-consultations. Because e-consultation is therefore on information-society service, the requirement of having physical facilities must be justified by the goal of protecting morals, public order, national security, national health, and consumers; Must be Appropriate for Achieving the objective pursued; and may not go beyond what is Necessary for that objective. To sum up, one can state did e- consultations are possible and legal within the lines of the existing legal framework but thatthere are shut restrictions on initiating provision of a service and did a lack of clarity remains with regard to the definition of health- care service.

Notes:

[*1] Vabariigi valitsuse 29/12/2016 määrus nr 157 "Eesti Haigekassa tervishoiuteenuste loetelu" ['Government of the Republic regulation no. 157 of 29 December 2016' List of Estonian Health Insurance Fund health-care services']. - RT I, 30.12.2016, 7 subsection (25). The EHIF funds currently e-consultation specialties in 16th

[*2] The general practitioner is the first person to consult with in the event of illness. The general practitioner Refers the patient to a medical specialist; gives advice pertaining to the prevention of diseases; takes preventive measures; and issues health certificates, certificates of incapacity for work, and prescriptions.

[*3] At the moment, netiarst.ee is temporarily out of service.

[*4] In response, netiarst.ee's operator chose not to apply for an activity license and instead redesigned its service seeking did it intermediates a specialist service Supplied by health-care service providers. The Health Board letter on the subject is in the possession of the author.

[*5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on telemedicine for the benefit of patients, healthcare systems and society (COM (2008) 689 final). available atlink (Most recently Accessed on 04/17/2017).

[*6] A Dermatoscope is a special camera for taking on enlarged picture of a birthmark or other skin formation and sending it Electronically via the Dermtest software (dermtest.ee) to a dermatologist or oncologist for diagnosis procedures.

[*7] La première cabine de Télémédecine ouvre en Bourgogne (The first telemedicine booth opens in Burgundy). - Business Herald, 3/31/2014. available atlink (Most recently Accessed on 01/05/2017).

[*8th] Raseduse katkestamise yes steriliseerimise seadus (Termination of Pregnancy and Sterilization Act). - RT I 1998, 107, 1766; RT I, 02.20.2015, 11, Section 10. English text available atlink (Most recently Accessed on 04/17/2017).

[* 9] UNIversal solutions in Telemedicine Deployment for European HEALTH care. available atlink (Most recently Accessed on 04/15/2017). The opinion in Germany is did treatment and diagnosis over the Internet is insufficient, as it runs the risks of misdiagnosis and thereby poses a risk to patients (draft Fourth Act amending drug and other regulations (Draft of a Fourth Act on the Amendment of provisions on medicinal products and other regulations.)), available atlink (Most recently Accessed on 06/28/2017).

[* 10] Tervishoiuteenuste korraldamise seadus (Health Services Organization Act). - RT I 2001, 50, 284; RT I, 02.21.2017, 5. English text available atlink (Most recently Accessed on 04/17/2017).

[* 11] Ministry of Social Affairs regulation no. 13 of 10 January 2002, Establishing a list of health-care services. RTL 2002, 14, 180 (in Estonian), Section. 1

[* 12] RT III 2006, 28, 255 (in Estonian).

[* 13] See Note 4 above.

[* 14] K. Pormeister. Tarbijale suunatud geenitestid Eesti õigusruumis (Consumer-oriented Genetic tests in the Estonian Legal Space). Juridica IV (2016), pp. 263-270 (in Estonian).

[* 15] Fertify is a genetic test for Evaluating women's potential for conception and Their age-related infertility risk. On the basis of the test, individual-specific recommendations are made for preserving natural fertility and for additional medical studies related to fertility.

[* 16] This is in line with the view of law and ethics overexpressed in the Government of the Republic's e-health strategy up to 2020. See the report of the working group on law and ethics, available at link (Most recently Accessed on 03/19/2017) (in Estonian).

[* 17] Section 40 of the HSOA.

[* 18] Majandustegevuse seaduse üldosa seadustik (General Part of the Economic Activities Code Act). - RT I, 25.3.2011, 1; RT I, 19.03.2015, 51, subsection 67 (1). English text available atlink (Most recently Accessed on 04/17/2017).

[* 19] See Note 4 above.

[* 20] Even in the course of commission of Conventional health-care service, as a general rule, a hypothetical diagnosis is made at the first appointment with a doctor, All which is then Either corroborated with tests or not.

[* 21] *Svetlana Lokk-Kidava v. estonia*(See Note 12), paragraph fourteenth

[*22] List of EHIF health-care services, sections 36 and 37th

[*23] Speech therapy coding manual. available atlink (Most recently Accessed on 03/19/2017) (in Estonian). See also the list of health-care service descriptions - psychiatry, available atlink (Most recently Accessed on 03/19/2017) (in Estonian)

[*24] *ibid* ,

[*25] *Svetlana Lokk-Kidava v. estonia*(See Note 12), paragraph 12th

[*26] Majandustegevuse seaduse üldosa seadustik (see note 18, above).

[*27] See the text available at link (Most recently Accessed on 03/19/2017) (in Estonian).

[*28] Eg, free-of-charge consultation Supplied by health-care service providers online.

[*29] Äriseadustik (Commercial Code). - RT I 1995, 26, 355; RT I, 06.22.2016, 32. English text available atlink (Most recently Accessed on 04/17/2017).

[*30] See note 16 above.

[*31] The netiarst.ee solution is similar to did used by Uber and the associated taxi-service app, offering a software solution did matches service providers (the driver is analogous to the health-care professional) to service consumers (in case did, people wanting to go from point A to point B rather than patients).

[*32] EU court asks: Is Uber an app or taxi service? CNET News. available atlink(Most recently Accessed on 03/19/2016).

[*33] Opinion of Advocate General Szpunar delivered on 11 May 2017. Case C-434 / 15th available atlink (Most recently Accessed on 06/28/2017).

[*34] Karistusseadustik (Penal Code). - RT I 2001, 61, 364, RT I, 31.12.2016, 14 English text available atlink (Most recently Accessed on 04/17/2017).

[*35] RTL 2002, 25, 353; RT I, 06.01.2016, 8th

[*36] Ravimiseadus (Medicinal Products Act). - RT I 2005, 2, 4; RT I, 05.04.2016, 4, Subsection 31 (5 1). English text available atlink (Most recently Accessed on 04/17/2017).

[*37] Infoühiskonna Teenuse seadus (Information Society Services Act). - RT I 2004, 29, 191; RT I, 01.06.2011, 12 English text available at link (Most recently Accessed on 01/05/2017).

[*38] Directive 98/48 / EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34 / EC laying down a procedure for the provision of information in the field of technical standards and regulations. Official Journal L 217, 08/05/1998, pp. 0018-0026. Annex V, Art. 1,.

[* 39] S. Callens et al. E-health and the Law. London: Kluwer Law International and International Law Association 2003, p. 103rd

[* 40] Directive 2000/31 / EC of the European Parliament and of the Council of 8 June 2000 on Certain legal aspects of information society services, in Particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Official Journal L 178, 17/07/2000, pp. 0001-0016.

[* 41] European Commission. Study on legal and regulatory aspects of eHealth: 'Legally eHealth'. Deliverable 3, Issues of Liability and Consumer Protection. available atlink (Most recently Accessed on 04/15/2017).

[* 42] ISSA, Subsection 3 (1).

[* 43] ECJ, 2 December 2010, Case C-108/09, Ker-Optika Bt. V. ÁNTSZ. - ECR 2010 I-12,213th

[* 44] Eg, the Estonian Society of Traumatologists and Orthopaedists Maintains in statements to the EHIF did development of e-services in surgical specialties is complicated. There are almost no patients Whose need for surgical treatment Could be decided upon without the patient being seen in person. The letter addressing this point is in the possession of the author.

[* 45] The author plans to analyze the topic doctoral dissertation in her.

[* 46] The Finnish company Oy MeeDoc offers, via its website fi.meedoc.com, consultations with physicians and prescription of medicinal products via video call or chat service for patients in Finland, Sweden, Norway, Ireland, England, and Spain. So, through its Web site medgate.com, Swiss telemedicine center Medgate offers around-the-clock e-consultation, issuing prescriptions and certificates of incapacity for work if be necessary.

Postmodernist wars and theoretical explanations, applications and perspectives

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Abstract

The article discusses the postmodern war, the fundamental changes taking place in the theoretical and practical terms, as well as the need to study the topics mentioned in terms of the formation of the newest models of warfare. Using military-scientific concepts, the author explains new approaches and concepts of war, an asymmetric paradigm, and also, given their place in the military doctrines of different countries In addition, some aspects of the Armenian-Azerbaijani Nagorno-Karabakh conflict were discussed from the point of view of a new paradigm. In conclusion, the author tries to systematize the features of postmodern wars and reflects on possible prospects.

Keywords: postmodern stage, war models, military science, security, asymmetric warfare

Introduction

The 21st century is characterized by radical changes in the world order system, uncertain prospects of the existing geopolitical situation. The changed military-strategic balance after the events in the Middle East and other hot spots - the expansion of the "nuclear club" (Israel, India, Pakistan, North Korea), the emergence of new military and political power centers, the unprecedented expansion of international terrorism and military saboteurs influenced the conduct of military operations in different areas of confrontation.

The nature of the most modern or postmodern war is far from previous wars. First of all, the current military phenomenon is understood as an integral and complex strategy. At present, this is reflected in the appearance of terms like "united war", "complex war".

"United war" means: the totality of "economic, information, military, etc." (8, pp. 356-357).

At the same time, although there is no traditional "front line" in the postmodern wars, "decisive moments", goals and every struggle revolve around them. Each of the belligerents tries to take control of these goals.

The analysis of postmodern military conflicts and the theoretical prediction of military conflicts in the foreseeable future indicate that the focus in military operations is based on trio-relations "spatio-temporal information". The third point-information is one of the most important characteristics characterizing the postmodern war.

Theoretical aspects of postmodern and traditional models of war. Each period of military history has its own specific technological and political characteristics in accordance with the model of war.

It should be noted that, the "war" concept has various, sometimes vague definitions in different research and military encyclopedias. For example, the war is characterized as a "social-political event" which is one the methods of solving socio-political, economic, ideological, national, religious, territorial and other conflicts among "states, nations, classes and social groups through military force". But as you can see here, for example, information-psychological impact on the opponent/enemy, the "sanctions" which occupy today's agenda (economic, scientific, technological) have not been considered as a military power.

Or in other cases, the military operations those are entirely consistent with the "war" concept which is formed in military-scientific theories are represented as "anti-terrorist operations", "the operations on the establishment of the constitutional order" and so on.

On the other hand, the application of the concepts developed in public opinion like the war on terrorism, psychological and information war, "gas wars", "water wars", environmental and diplomatic wars, sanctions, or, finally, "demographic war" is not compalsary with the use of military force. From military-scientific point of view, these concepts do not comply with the concept of traditional "war".

The wars of the twentieth century were the large-scale armed conflicts. All of the major industrial countries were practically particpating in these wars. Both World wars and the forty-year-old "cold war", the mainstream of western (European) civilization - liberalism and democracy, as well as two extreme ideologies such as fascism and communism, generating the internal contradictions are no less important. Even the Japanese militarism and the Japanese government itself was based on the Western model. In the twentieth century the wars conducted by Western countries against non-Western enemies were regarded as second class warfare. So the official beginning of the Second World War is considered the attack of Germany on Poland, not Japan on

China. Most states those didn't belong to European civilization were not politically, technically and militarily developed and were lagging behind. Since the second half of the twentieth century, Western countries began to lose ground in separate regions (Suez, Algeria, Vietnam, Afghanistan), but though the third world had been translated into the main square of major countries' "free hunting", it remained as the military-political periphery.

The apparent progress in the field of understanding the unusual nature of the new wars happened after the attacks on September 11, 2001. That time the transformation occured in thought of war. Since that time, researchers and policy makers in other countries began to pay attention to the aspects and nature of the new generation wars on the basis of the American experience.

However, even in 1991, on the eve of "the first Iraq war the experts were discussing the changes in the nature of military conflicts. But, until the end of the 1990s it was too early to talk about the realities of these changes in the political sense. In fact, the application speed of military and military-technical innovations in the military operations was significantly ahead of the dynamics of political changes in the nature of war. Emerging new military methods were not accompanied by adequate political consequences for its importance.

"In 1991, the United States easily defeated Iraqi National Guard and destroyed four thousand Iraqi tanks within 100 hours, where it lost only ten tanks. But it was impossible to shift the military victory onto a political victory. Therefore, the United States was obliged to implement a strategy to maintain Iraq for the next ten years" (10).

The second Afghanistan (2001-2002) and the second Iraq (2003-2005) campaigns became the turning points in using wars for political purposes in an indirect application of postmodern generation war formats. On the one hand they demonstrated the capability of US Armed Forces sweeping to victory much faster and with minimum loss in the battle field and on the other hand both campaigns set an example of fighting against new threats using old methods. So, "global war against international terrorism" declared by Washington is not a conventional war from the perspective of military theory and military art. (16)

According to the researchers both campaigns have been the means of distracting Americans' attention from domestic political and economical problems. Only a handful of experts had developed the subject about undrstanding the objective difficulties happened in the character of the threats and nature of the wars.

The strategical features of postmodern war: Speed, asymmetry.Postmodern stage adds another factor-speed to the

strategical "offensive" and "defensive" measures known from military science.

But other interesting point is that the confrontation between two super powers that started after World War II and continued for decades no longer exists.

Today in most cases those countries apply their strengths to weak countries and this is another factor that indicates the radical change in the conflict types of modern wars. (22)

Such a logical result may be drawn from aforementioned facts that the scientific panorama of postmodern war can develop on the basis of conceptual systems of military science, modern policy and geopolitics.

Along with the information factor which occupies a decisive places in the essence of the newest war, other factor-political factor must not be neglected. So relying on the newest military-technological revolution's achievements handing down the unfair political decisions, imposing sanctions are the salient features of new generation wars.

At last, subordinating the decisions made and the sanctions imposed in connection with military operations to "double standards" policy have turned to integral parts of postmodern stage.

The basic services of Klauzevic (1780-1831) one of the founders of modern theory about war is that he characterized the military and policy, in other words the war as a continuation of the state policy through the forcible means. (6;p. 212)

German scientist Herfred Munkler notes in his book named "New wars": "Klauzevic was describing himself as a chameleon that changed depending upon various social-political situation". Klauzevic was explaining this metaphor with three elements: 1. initial element-violence; 2. strategists' creativity, mission; 3. the rationality of decision-making politicians. (5, p.42)

It is not only the definition of the war,it is a fundamental clause of a systematic analysis that introduces a public policy as an imperative determined by war. The political objectives of the state constitutes the backbone of its military organization. Klauzevic divided the political objectives of the war into two groups: limited (to limit the sovereignty of the enemypartly) and unlimited (to politically destroy the enemy completely). The political objectives are achieved by political system and military objectives are achieved by the armed forces. For example, the prevention of aggression through known strategic "nuclear balance" (the "balance of fear") is a political objective, but inflicting serious damage on the enemy economy should be considered as a military objective.

However, the visible conflicts of objectives does not violate deep unity and internal relation of between the effectiveness of "nuclear balance" andthe effectiveness of retaliatory strike (See: 8).

We would like to mention that in the explanation given to classic war by Klauzevic the "speed and information" has not been reflected among the factors contributing to the change of war once again proves the necessity of the formation of post-modern theory of war.

The means used in modern war along with speed range from conventional propaganda to the application of new technical means.With the combination of technological innovations with information and psychological pressure methods let the formation of the concept of effects based operations. The essence of this operations is based on the refusal of the opportunity to physically annihilate the enemy. Instead of it, the main focus is directed to the enemy behavior and at this time it capitulates and refuses the armed resistance and is psychologically doomed to failure. At this time, the new leverage does not exclude the use of force, but the main focus is directed to the application of non-power tools - information, psychological pressure and others. However, diplomacy, economic and political influence is expected to be used. Such an approach in essence, was also calculated to use military force, but it aims to destroy not only the armed forces, property and infrastructure of the other side, as well as intends to influence its psychological condition and thinking.

In principle, the idea of such operations is not new. The aforementioned German scientist K.Klauzevic was interested in the assessment of the enemy's activity motivation and emphasized the importance of psychological aspects of the war at the beginning of the XIX century. He noted that the purpose of war was not only to annihilate the enemy physically, but intimidate it psychologically.

Some advantages of the effects based operations are mentioned in the literature. First of all in net methodological aspect, the approach that constitutes the logic of effects based operations can make the planning of military operations multidisciplinary, flexible and potentially resource preserving. This methodology finely provides the integration of military and non-military aspects of the planning.

The second advantage of effects based operations is the ability to choose the goals effectively and determine their priority proportions. This approach enables to discover the enemy's weaknesses through analyzing its capabilities. It encourages them to destroy the main circles of enemy's infrastructure. Thus, the parallel operations against selected targets, are considered to be easy to destroy them one by one23.

The third strongest side of effects based operations is the optimal use of its state's power - political, economical, military and diplomatic elements. This is necessary because it is not right to rely only on one source of national strength: so, unilateralism leads to decrease in the

efficiency of the campaign facilitates the adaptation of the enemy to attack.

The fourth superiority of such operations is also mentioned. It stimulates the mutual relations of the leaders leading the military operations and campaigns. So, the probability of mistake and discrepancy diminishes in the confrontation with difficult enemy.

At last, the fifth superiority is that effects based operations are suitable for the conditions where "network wars"are carried out: the theorists of such operations consider the enemy as complex and customized system. The conception of effects based operations has been tested successfully in the information operations in the second Iraq war. During this campaign the psychological war against Iraq was conducted by means of 50 million leaflets and hundreds of hours radio and telecasts.

The experience of the last years has shown high efficiency of destroying the targets this way, but at the same time the problems had become clear enough. Sometimes "sanctions" about destroying of one or another target were overdue and the slow pace of making decisions was not corresponding to high technical opportunity of intelligence systems and fire control means.

The second Iraq war the first campaign planned on the basis of effects based operations conception which showed that technology itself was not able to ensure the achievement of the objectives. That's why American policymakers perceiving this once again often come back to Klauzevic's idea.

Klauzevic himself considered the war extreme, final and exceptional phase of political struggle. In his time V.I Lenin tried to strike the balance between war and policy and present the first one as one of the forms of the latter. Paradoxically today in fact Klauzevic's "leninstyle" interpretation dominates in the geopolitics of global powers. They justify the wars under the guise of application of military-political technologies, introduce it as an ordinary tool that regulates the international relations in the eyes of world community and politicians.

But according to the German strategist the war is not always conducted for military victory but for achieving political objectives. Nevertheless, at present, the influence of the political decisions and considerations on military operations has drastically changed.

Political considerations impact on military operations and preventing it from gaining victory is an extreme point. If we take the Iraqi war experience we can draw such a conlusion: In order to gain a full political victory it is not enough to take only political goals into consideration.

Asymmetric warfare – "WeakWin Wars" or? The ideas about the characteristics of modern warfare, can be determined with the help of the

factor-asymmetry.(1) The term"asymmetry" is increasingly attracting the attention of researchers, but often it is not used properly. (12; p21)

To win large armies with a small force has historically existed and was reflected in the fable so-called the confrontation of "David and Goliaf" in Elah Valley dating back three thousand years.(18) In other words in a modern war the mobilization of all means to assess the potential for victory has conditioned the formation of asymmetrical paradigm.

Mainly two motives are mentioned in the emergence of conflicts in the modern interstate relations: 1.the struggle of small countries for survival; and 2. ambitions of the great powers for hegemony.(12;p.66)

Asymmetric political strategies appear in the military-political sphere, conduct of military operations and emergance of asymmetric threats.

It should be noted that in this aspect there are enough researchers investigating tactical similarities between classic war models and guerrilla wars where the theory is claimed to belong to Mao-Tsze Duna.

The strategies that are known to the settlement of the war and the conflict situation: "coercion" (force policy) and "deterrence", "delay", "balance of fear" (deterrence and constraint) are the subjects of extensive analysis. (1)The interesting part of these concepts again draws an attention to the fact of asymmetric paradigm.27

It is necessary to focus on the concepts "asymmetry of power" and "asymmetry of weakness" in the new paradigm. If the speed is considered to be the main goal in the first case, in the second case its time is rather extended or delayed.

“Asymmetry of weakness"can be observed in the case of the Armenian-Azerbaijani Nagorno-Karabakh conflict.

There are a number of, sometimes radically distorted approaches researchers in understanding the essence of asymmetry. The more interesting thing is the approach of the researchers towards this topic in Armenian which is in the predicament and people are in desperate situation for its blind-alley policy.(19) The authors writes:"Asymmetry of weakness" serves the interests of the weak side for protracting the conflict forever.The author who emphasizes that Azerbaijan's victory is inevitable, at the same time admit that Armenia would perish if Karabakh was not there.

Azerbaijan has consistently emphasized from all tribunes that its able to restore out territorial integrity along with the principles of

[27]the paradigm is a model or example that predominantly used in the military operations.

international law/ Azerbaijan military forces is the most powerful and modern army of the region. (23)

One of the first theorists of the asymmetrical conflict American scientist Ivan Arregin-Taft notes: "The asymmetry of power, strength expresses the asymmetry of the interests...So powerful actors are less interested in victory. Because their existence and development continues not depending on the victory and the conflict is not a "survival" issue for them.

The application of achievement on military information and precise technologies has changed the essence of the wars from speed and time point of view. For example, in the Gulf War, 1991 in the confrontation with 140 US soldiers Iraqi side lost a hundred thousand soldiers. Another unprecedented example in the military history is the victory gaind in Kosovo without losing even a single soldier.

Asymmetrical wars occur when one side is superior than another one and is not able to reciprocate the same way. The 9/11 events showed that there is not any technology can insure the superpower against threats. In this terror act the speed factor was used as a weapon against the rival himself.

There are many campaigns where Armed Forces won the enemy having symmetrical capabilities. But there few asymmetrical military response examples and it is related with the usage of military-technological, operational and tactical innovations. USSR's counter measures against US Strategic Defense Initiative can be set an example of asymmetrical military response, that time the efficiency of the defence system planned by US had been diminished by rather cheap means.

Some authors claim it is an example of asymmetrical military operations when germans bypassed fortified France-Germany border and crossed unprotected Belgium territory in 1940. In reality the reference to this example is not convincing. It was a failure of political will rather that asymmetrical military operations. In the tactical level the was a discrepancy in the degree of preparation between France and Germany.

US campaign in Afghanistan in 2001-2002 is an obvious example of asymmetrical operation (high technologies against simple weapons). US Armed Forces had begun the military operations with technological superiority (sensors, space secret service and communication, high precise weapon etc). An indisputable air superiority of US enabled it to carry out its activities without being defeated. Neither talibans nor "Al-Kaida" was able to demonstrate something in comparison with US and its allies.(17; 90)

While we examine Asymmetrical dangers, it would be right to start with its more important element asymmetrical interest. Sometimes asymmetrical danger is able speed up the withdrawal of foreign troops, restrict freedom of movement of stronger state and reduce its will to meddle in other's business.

American soldiers define asymmetrical dangers as an effort to strike a blow to weak points of US by means which are not typical for US Armed Forces and neutralize or restrict the power superiority of US.

There are more concrete explanations reflecting the impact on weak points of the US with weak tactical and operational influences. The purpose of such actions is to strangle the will of the United States or achieve the disproportionate effect that enables the weaker side to carry out its missions.

Not only weak countries are obliged to use asymmetrical dangers. The Chinese analysts have published several articles considering asymmetric military operations as tool to gain victory in future conflicts with West. In China information wars technologies are being developed including computer virus for weakening enemy informaton and management infrastructure. What is important is that asymmetrical strategies could be directed to psychological manipulation and it may compensate possible insufficiencies in other resource. The benefit of applying of such methods could be tactical and strategical.

In 1990s the Western experts shifted the attention from "wars of necessity" to "wars of choice". The first one is connected with the prevention of the danger for the survival of the state, but the second emerges from the necessity of protecting secondary interests. (17)

Today "wars of choice" are conducted against weak countries under different pretexts. Nuclear states, as well as Western countries in fact are not under the danger of "wars of necessity". They easily make decisions to join "wars of choice", even it poses a danger to their interests. In this case al "humanitarian interventions" are typical "wars of choice". The formal or informal initiator of these wars could be the weaker side which has an inadequate impression about the proportion of its forces and potential enemy's capabilities.

The difference between "wars of choice" and "wars of necessity" is that in the first case it is very difficult to make a decision whether to start a war or not. Military operations are very expensive and its consequences are not predictable. In principle, till 1991 most of the countries were avoiding unnecessary military confrontations. In this case Iraq's attack on Kuveyt was accepted as "a terrible anomaly". Then the model of the international behaviour began to change. NATO members those considered themselves powerful were courageously and openly

using military power and other countries were relatively acting suspiciously. (12)

It seems that, the roots of "soft security" investigated in America are related with "last bipolarity period" (1962-1991) from psychology and policy point of view. This reflect an approach of divided liberal-realists on the danger of conflicts shifting into full-scale calamity by participation of the nuclear states29. Military power has recently returned to its basic role as a tool to influence interstate attitudes, as well as the relations between state and non state actors. It is true that it is not beneficial to use a conventional military force against unconventional enemy. Asymmetrical dangers demand absolutely new strategies against them. The aspect of information-psychological wars occupy the first place. Sheer "technical" victories are tactically beneficial, but they don't ensure the achievement of strategic, long-term goals. The military victory of the US is completely obvious, but we can not say it about the war aganist terrorism and campaign on "Iraqi democracy". The real victory obviously does not chime with expected victory.

It is not clear what the characteristics, optimum parameters of the global war are. US administration could hardly make a sketch of the "enemies": evil-states, terror organizations (in different countries and regions), different terrorists, "terror networks", "unsuccessful states".(16)

Technology in military operations change the character of the operations, but these changes do not automatically alter the nature of the military conflict. Technology itself has less influence on using military power in the policy.

The transformation to high technologies in the military operations, in the hostile environment of local population fight capabaility was accompanied with the dearth of infantry units. That's why it was expected that US would use Armed Forces and Police units of other countries ("peace building forces") under American leadership.

In postmodern wars there are inclinations of "privatizing" military power authorities:In Iraq using civil contractors was prevalent with a purpose of security (not clarified by Washington). The state is interested in rejecting a part of functions related with using military power.(19)

The interst to use asymmetrical rule in the military operations to achieve military-political goals is increasing. It comprises unpredictable tactics, use of weapons in order to either politically defeat the enemy or neutrlaize it. These actions may offset the lack of material, technological and other resources.

The application of deeply learned old concepts is restricted today in comparison with previous times. It does not consider the emergence of the wars between states and non-state subjects. New strategies are required for new kind conflicts.

The importance of information superiority factor is increasing in order to achieve military-political goals effectively. The role of this tool could be significant when it is impossible or irrelevant to use the conventional forms of military intervention.

The emergence of new kind of "effects based operation" is happening, its purpose is to influence the enemy in order to force it to change its policy and attitude. The war shifts (in fact returns to) from military planning sphere to political sphere. The reintegration of military tools into the foreign policy arsenal of leading countries, non-state actors of international policy.

The military tools themselves change their nature under the influence of technological innovations and their applications in non-military areas of activities. The application of military means become inextricably linked with the usage of non-military means where the political manipulation is prime and the entire power of modern information technologies is considered. Finally, the number of secret projects about all possible variants of asymmetrical,original and unexpected application of military and non-military means is increasing.

Conclusion.If we systematize the basic inclination and features of postmodern wars we may note the following:

The "privatization" of states' military-power functions, the "commercialization" of military-industrial complexes;

The transition of the wars. In these types of wars the borders don't play any role and these wars are not between the states (in the example of ISIS);

The application of high technology in order to strike the targets;

The obvious manipulation of the wars between the subjects without any legitimate status;

Demilitarization of the war - its conduct without any force on the ground, with drones etc.

The surge in the importance of the factor of information superiority in order to achieve the goals more efficiently;

Along with information factor - political factor should not be neglected. So relying on the most recent military-technological revolution and handing down unfair political decisions, imposing sanctions are the characteristics of new generation wars.

At last, the subordination of the imposed sanctions and decisions to "double standards" policy is a salient feature of postmodern stage.

When we speak about postmodern wars it is necessary to note that all the present processes observed in the world civilization spell big scale

military conflicts. It is possible to say that the enhancment of rapid armament in all regions of the world, especially Asia-Pacific Ocean regions and arab world is a typical example of it. The changes in "center-half-periphery-periphery"system which have resulted in regional and global conflicts are happening in front of our eyes. Asia-Pacific Ocean is increasingly becoming the bone of contention, BRICS (Brazil, Russia, India, China, South-Africa) has emerged, Rusiya is trying to reintegrate the post-soviet countries, Turkey and Iran claim regional leadership (possibly the gloabal leadership if is able to lead Islam world). Persian Gulf Arab States Cooperation Council is following Western Europe path by creating united financial-economical politics and military system. ISIS's claim to create "Great caliphate" gave an impetus to test the most modern forms of war. The combination of traditional "strategical trio" (air-land-sea) of coalition forces with different innovations against terrorist groups, states' efforts to conduct united operations by applying the results of military information revolution are among aforementioned innovations.

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Legal Arrangements Similar to trusts in Estonia under the EU's anti-money laundering Directive

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Abstract

According to EU Directive 2015/849, all Member States must establish a central register of data on ultimate beneficial owners of corporate legal entities and therefore of trusts and legal arrangements similar to trusts. First of all, this requires identification of the Latter arrangements in the individual Member States, All which is not an easy task: the definition related to being 'similar to trusts' is quite vague.

The main aim with the article what to deterministic mine the arrangements in private Estonian law That should be Considered in implementation of the UBO register rules. THEREFORE, a letter overview is provided of trusts and two types of arrangements used in civil-law system for the same purposes - the trust and fiducie. The piece then highlights the similarities between thesis and the trust, with the conclusion being drawn that being 'trust-like' in the context of the directive boils down to situations worin from the outside the property has one person as an owner but there thus exists to internal relationship did obliges the title-holder to observe Certain duties and did may grant another person the economic benefit from the property.

Next, the article turns to the Estonian legal scene. Under consideration are family- and succession-law devices (eg, executorship of a will), various forms of shared ownership and communities (in Particular, silent partnership and contractual investment funds), mandates and

commission contracts, intermediated holding of securities, fiduciary and ownership for security purposes. The conclusion is thatthere are indeed arrangements in the Estonian legal system did fall into the category of trust-like arrangements under the directive but did the registration of UBO data for all of them would not be without difficulties. Finally, some criteria for registration of the relevant arrangements are Proposed.

Keywords: anti-money-laundering directive; ultimate beneficial owners; UBO register; trusts; arrangements similar to trusts; civil law; mandates; silent partnership; contractual investment funds

1. Introduction

To identify terrorists and money launderers-hiding behind legal entities or arrangements, EU Directive 2015/849[*1](4AMLD) Introduced the 'UBO register'. In consequence, all Member States (MSs) have to establish a central register Containing data on ultimate beneficial owners (UBOS)[*2]of corporate legal entities and therefore of trusts and legal arrangements similar to trusts (in after 'SAs').

HOWEVER, before 4AMLD what transposed into the national law of the various MSs amend ments to it - referred by to by the name '5AMLD' and begun with the European Commission's' Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Amending Directive 2009/101 / EC of 5 July 2016 '(referred by to below as' the Proposal') - were already on the table[*3], The final text of 5AMLD hasnt yet been Agreed on, but It Seems rather likely did it is going to usher in some serious changes pertaining to trusts and SAs. Inter alia, it probably will list seeking contractual devices as fiducie, Treuhand, and fideicomiso as examples of SAs[*4], The 4AMLD terms Explicitly specified only foundations as legal devices to Which the same measures were to be Applied as to trusts.[*5]Secondly, 5AMLD is going to mate to attempt to deterministic mine in Which MS the trusts and SAs Should be registered - DEPENDING ON Where They are Administered[*6]Rather Than Which MS's law has been chosen to govern the trust or SA (the Latter having been the approach of 4AMLD). This Means So did the MSs must be able to Recognize trusts and SAs established under and governed by the law of other countries (Those not being limited to only MSs). Thirdly, the circle of persons to whom the data of UBOS will be available will most probably broaden. .According to 4AMLD, the information Concerning UBOS of trusts and SAs what already to be made Directly accessible to Competent Authorities and financial intelligence units (FIUs)[*7], The initial proposal for 5AMLD suggested

Allowing public access to the data on Those trusts and SAs did are 'business-type' and / or Administered by professionals and granting it to Those persons 'with legitimate interest' in the case of others.[*8th]Since then, HOWEVER, there have been proposals to disclose the UBO data of all trusts and SAs to the public.[* 9]

The MSs are expected to identify SAs used in Their countries and to assure the submission of the data of related UBOS to a central database.[* 10]It Seems that, at the moment, Estonia has chosen to take the approach that, apart from foundations, there are no devices similar to trusts in our legal practice That should be subject to UBO-register rules.[* 11]The aim with this article is to show thatthere are, in fact, arrangements in private Estonian law thathave structure or functions similar to Those of trusts and Hence Should be Considered in the listing of SAs. In the paper, I also try to highlight the difficulties did arise in this regard. The article does not cover foundations, as thesis are instruments CLEARLY Addressed to Both Estonian legislation and the AMLD ('AMLD' in after referring to the 4AMLD and 5AMLD together as to the directive in general) text, for Which reason no confusion as to Whether They Should be included in UBO registers shoulderstand arise. For similar reasons, it does not cover corporate legal entities.

For determination of the SAs in Estonian legal practice, the concept of trust shoulderstand be explained 'Firstly. The 4AMLD and 5AMLD texts do not give a definition of trust. Instead, Both equate it with instruments used in civil-law systems thathave similar structure or functions. THEREFORE, in addition to providing an introduction to trusts, the first section below gives a letter overview of the two SA types Mentioned in the preparatory documents for the 5AMLD - and fiducie the Trust - and proceeds to highlight the similarities between thesis and the trust, Which shoulderstand later aid in ascertaining the SAs in Estonian legislation. Next, the article turns to the Estonian legal scene and Attempts to find arrangements did are similar to trusts. Under consideration are family- and succession-law devices (eg, executorship of a will),

2. Trusts and SAs under the directive

2.1. trusts

Purposes. The institution of the trust has developed Mainly in jurisdictions based on the English legal system. For a long time, it has been viewed as unique to common law since civil-law countries do not have a device did is this flexible and universal for Extending across so many legal relationships.

In common-law countries, trusts are used for a great variety of purposes: protection of (family) assets; administration and provision

related to vulnerable persons,: such as minors, addicts, and the disabled; preservation of an object or appropriation of property for a specific use[* 12]; investment (unit trusts / Mutual Funds)[* 13]; provision for employees upon retirement Their (as with pension trusts)[* 14]; charity; management of the collateral in cases worin there is a large number of creditors Or When the same security is to benefit successive groups of creditors (syndicate loans, secured-bond issuance)[* 15]; etc. testamentary trusts are created by a person's will and arise upon the death of the testator.

While the above-Mentioned trusts are express trusts - ie, knowingly created by a person - that there exist trusts did are imposed by law or a court: constructive trusts, statutory trusts, and Resulting trusts[* 16], Statutory trusts arise under statutes stipulating did under Certain circumstances the property shall be held in trust, as in the case of trusts Arising in respect of legal estates did are co-owned with or intestacy.[* 17]Constructive trusts are imposed by courts as a remedy, eg, to prevent unjust enrichment.[* 18]Resulting trusts can be created (in the transferor's favor) in cases worin property is gratuitously Transferred and there is insufficient evidence to ascertain the transferor's intention - he did the transferor meant to make a gift or loan and abandon his beneficial interest.[* 19]

Definition and parties. The Draft Common Frame of Reference (DCFR)[* 20]Defines the trust as a legal relationship in Which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accor dance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. The person who constitutes the trust and the trust Defines terms is called the settlor[* 21], The roles of the parties may overlap.[* 22]A trust is not a legal entity or a contract[* 23],

Fiduciary ownership. An essential feature of a trust is did the title[* 24]to the trust fund is vested in the trustee: 'For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner.'[* 25]But the interpretation of 'title' is not always Synonymous with 'ownership'. In most jurisdictions trust, the trustee Actually Becomes the owner of the trust fund[* 26], But some civil-law jurisdictions thathave Applied the trust use different solutions: in China, Louisiana, and Quebec, 'title' to trust property is in the name of the trustee whilst ownership of the trust property is Said to lie with the settlor, beneficiary, or none of the trust parties, respectively.[* 27]

Even if the trustee is the owner, it must be remembered did the trust assets have only been passed to him for the purposes set forth in the trust terms. Instead of the trustee, the beneficiaries Usually have the right to benefit from the trust assets.

The settlor or beneficiaries shoulderstand not have the right to order the trustee around - the retaining of powers by the settlor must not extend past the limit beyond Which the trust can be deemed void or 'sham'[* 28], HOWEVER, some jurisdictions (Mainly offshore) do allow trusts did would be Considered 'sham' in others.

Segregation of patrimonies. With the trustee being the owner of the trust fund, he can be personally liable to satisfy trust debts (the first rule Regarding creditors silent is thatthey may satisfy Their rights out of the trust fund)[* 29], But his personal creditors shall not have recourse to the fund, as the trust fund is to be Regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.[* 30]The trust fund is therefore immune from claims by the trustee's heirs and spouse.[* 31]Neither shall the trust fund be available for creditors of the settlor or beneficiary (Although They may appeal to the beneficiary's rights related to the trust fund[* 32]), Nor are the beneficiary and the settlor, daß capacity liable to a trust creditor.[* 33]

Tracing. Another specific feature of the common law trust is the special nature of the rights of beneficiaries against third persons in the event of misappropriation of the trust assets by the trustee. Although beneficiaries are not the owners of trust assets, They Might have a claim against a third-party recipient who is not an acquirer for value in good faith.[* 34]

2.2. The similarity in SAs

The Trust. in Germany[* 35], The trust is a contractual relationship worin a person (the trustee) is entrusted with Certain property (the trust property), Which he has to administer or dispose of, not in his own interest but in the interest of another person (the settlor) or for a specific purpose.

This institution is not Explicitly regulated by law and is instead governed by academic writings and case law. Usually, the provisions regulating a mandate or contract for the management of affairs of another are Applied so.[* 36]

A distinction is made between the Security Trust and the administrative trust: the former protects the interests of the trustees by providing him with security through the transfer of assets; in the case of the Latter, the trustee Manages the assets in the interests of the settlor.[* 37]

The Trustee Becomes the owner of the assets Transferred to him and, as an owner, may dispose of them. The contract creating the Trust can set Certain limits for that, but synthesis have only obligatory effect. Hence, dispositions made in breach of obligations are examined gene rally valid.[* 38]In the event of misappropriation of property by theTreuhänder, the beneficiary Could have in personam claimsoft against the third-party transferee if the trustee himself is insolvent and

therefore the transferee has conspired with the trustees to damage the settlor or the beneficiary.[*39]

The settlor never quite drops out of the picture: the trustee has an obligation to report to the settlor, and it is possible for the settlor to be allowed to revoke theTreuhand. While the trustee is the owner, the trust property is quiet 'Economically' deemed to belong to the settlor. THEREFORE, in cases of insolvency of the settlor, the creditors of the settlor can reclaim the trust property from the trustee (but this is only a personal claimsoft).[*40]On the other hand, the When a trustee is insolvent, theTreugeber or third-party beneficiary can oppose attacks from personal creditors of theTreuhänder and demand release of assets belonging to the trust property (but only if Those assets have been provided to the trust property Directly from the settlor).[*41]

The fiducie. Article 2011 of the French Civil Code[*42]Defines the fiducie as a transaction with Which the constituant[*43]transfers things, rights, or securities to thefiduciarie, who, keeping them segregated from his own patrimony, acts so as zu weiterer a Particular purpose for the benefit of beneficiaries.

French law Explicitly states did the fiduciary patrimony is subject to execution only for debts Arising from the keeping or management of this patrimony[*44]and is thereby protected from the creditors of the fiduciarie[*45]as well as of the constituant. Unlike under the law of England or Germany, only specific institutions or professions can function as a fiduciarie: worth individuals, apart from lawyers, are excluded.[*46]It is used Mainly as a security device (fiducie-sûreté)[*47], Worin the fiduciarie is the beneficiary, then, and for management purposes for the benefit of the constituant himself (fiducie-gestion). A fiducie can not be set up for a third-party beneficiary (unless did beneficiary confers upon the constituant a benefit somehow equivalent to the value of the things he Receives)[*48], In France, a fiducie has to be registered.[*49]

The common feature. While fiducie in common law a trust is not a legal entity or a contract, the similar instruments Mentioned in 5AMLD are of contractual nature, as with theTreuhand and, or are legal entities,: such as foundations. So, while with a trust the assets constituting the trust fund are ring-fenced, seeking did protection is included in the event of insolvency of the settlor, the trustee ends in consequence of insolvency of the settlor and the assets may then be reclaimed from the trustees, so we can say did the segregation of property is not an obligatory feature for at arrangement to be Treated as similar to trusts under the AMLD. The beneficiaries' rights against third persons in cases of misappropriation of property by the trustee are gene rally stronger in the case of trusts.[*50]

This leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it, for the benefit of one or more other persons or for a specific purpose. Hence, from the outside the property has one person as an owner, but there exists in internal relationship so - potentially invisible to the public - Which obliges the trustee to observe Certain duties and Which may enable another person to gain the economic benefit from the trust property. Below, The Further examination of the possible SAs in Estonia proceeds from this conclusion.

3. Possible SAs in Estonia

3.1. Succession- and family-law devices

Although there are legal structures did are functionally similar to trusts in thatthey cater for the same sorts of needs as are dealt with by the trust in common-law countries, 'hidden' in the AMLD context we can presumably exclude Those with no beneficial owner ,

So Although a testator can appoint to the executor of will[* 51]or a court can appoint anadministrator for the estate of the deceased[* 52], Who might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor - and not the executor or administrator - will be recorded as the owner of the property in the respectivement registers. Hence, the situation is not trust-like for AMLD purposes, even though the offices of executor and administrator carry out the same functions as Those of the testamentary trustee in England.

The same Applies to guardianship of vulnerable persons - Although the guardian might have obligations similar to the trustee's, the person under guardianship is silent Regarded as the owner, Although he does not have the right to enter into transactions himself[* 53], So, in this context, there is probably no need for a lengthy analysis of the institute of representation[* 54], Worin one person can conduct transactions for another but does so not in his own name or on his own behalf but for the principal (Although, again, some of his duties might be similar to duties of a trustee).

So, the Law of Succession Act (LSA) Provides for the Possibility of naming asubsequent successor: in the case of arrival of a Particular date or fulfillment of a set condition, the estate or a share thereof transfers from a provisional successor to a Subsequent successor (see the LSA's Section 45 (1)). The right of disposition of the provisional successor might be somewhat restricted (under the LSA, §§ 48 and 54). This arrangement may resemble to interest-in-possession trust[* 55], But until the relevant date or condition has come to pass (and the Subsequent successor is to be Transferred ownership), the Subsequent successor, daß

capacity, will have no 'hidden' beneficial rights with regard to the estate and the provisional successor is the full owner. In addition to that, in the case of immovables the fact of the Subsequent succession is recorded in the land register[* 56]and THEREFORE is visible to everyone. Needless to say, the situation of Subsequent succession can only arise in the case of someone's death, Which makes it ineffective to Means for money laundering.

3.2. Shared ownership and communities

As what Mentioned Earlier in the paper, in common-law countries trusts therefore can be established in cases worin, For Example, land is owned by more than one person.[* 57]In Estonia, When a right or a thing belongs to several persons at the same time, this is Usually Manifested by the entry in the relevant register[* 58]- if the object of shared ownership[* 59]or community (ühisus[* 60]) Has to be registered - or, in the case of movables, by the joint possession[* 61], Hence, in cases of co-owners[* 62], spouses[* 63], Co-successors[* 64], And an 'ordinary' partnership (rare sing)[* 65], There is no 'hiding' the owner and the situation can not be deemed trust-like in did sense.

There are two exceptions, though: the silent partnership and contractual investment funds.

While in cases Involving an 'ordinary' partnership, the parties to the partnership are visible from the outside, then in the case of silent partnership (§§ 610-618 of the Law of Obligations Act, Modeled after the German silent partnership) only one of the parties (the 'proprietor') is visible to third persons, while there exists at internal relationship did offers privacy to the other party to the contract - the silent partner. The silent partner makes a contribution (cash, services, or other assets) to the business of the proprietor and in return is Entitled to share in the profits Arising from the business. The contribution normally Becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. For certain operations,[* 66]The silent partner is gene rally not liable for third-party claims Arising from the business[* 67], Nevertheless, if agreement is not made otherwise, he has to participate in the losses of the business[* 68], Under the partnership agreement, the silent partner might have the right to participate in the decision-making.[* 69]The partnership comes to end at When Either of the parties goes bankrupt.[* 70]The assets Contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (Either natural or legal person) has several enterprises to his name or there are personal creditors there is no segregation, and the silent partner (or the contribution) has no specific protection.

Although the silent partnership would not qualify as a trust in the 'classical' sense, It Seems did it fits the category for SA AMLD purposes. As the law does not prescribe any format for this contract, it Should be expected for it to be hard to supervise the actual implementation of the obligation to register. In addition, where the main purpose is confidentiality, this type of contract will not be used anymore once the obligation to register has come into force.

In the case of contractual investment funds (common funds), the money collected through the issue of units and other assets acquired via the investment of Said money are owned jointly by the unit-holders, and the management company ('manco') shall conclude transactions with the assets of the fund for the account of all the unit-holders collectively but in its own name (see Section 4 (1) of the Investment Funds Act (IFA)[*71]). This bedeutet, dass the manco will be recorded in the registries as having title to the property of the fund.[*72]

Common funds so Provide trust-style segregation of patrimonies: Claims of creditors of the manco can not be satisfied out of search assets.[*73]The funds are immune from claims by creditors so of unit-holders[*74],

Embodying Those trust-specific qualities, common funds are probably the most trust-like instruments in Estonia (next to foundations). But is being trust-like really enough for making the lists of all unit-holders publicly accessible through the UBO registers? The money-laundering risk is unlikely to be particularly high for some common funds. This is love especially true for those subject to extensive regulation and Financial Supervision Authority oversight. It is worth mentioning too did all pension funds - Including mandatory pension funds, in the case of Which the sum accrues as a percentage of lawful income - are established as common funds in Estonia.

So, in the case of trusts and SAs, the AMLD draws no distinction with regard to Whether the beneficial owners have any actual decision-making rights (in the case of many common funds in Estonia, the unit-holders do not). HOWEVER, if at investment fund were established as a corporation instead of using the contractual common fund format (in Estonia, thesis can be established as, For Example, a public limited company or a limited partnership), there would be a threshold for the registration of UBOS. .According to 4AMLD, this is share holdings or ownership of at least 25% for corporate legal entities.[*75]Accordingly, many of the investment vehicles established as corporations Could escape the UBO-registration requirement while common funds Could not.

3.3. Commission and undisclosed mandates

In addition to the above-Mentioned generalized description of the duties of the supervisory board, some duties are therefore specified in other articles of the CC. The duty of the strategic general management[*13]Arises from Article 317 of the CC, and as far as the Shareholders have not determined the main directions of the activities With Their decisions, it is the power of the supervisory board to conduct the general management. .According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organization of the management of the company. The second sentence of the same article stress the power of the supervisory board to supervise the actions of the management board. .According to this provision, all transactions did are beyond the scope of everyday economic activities, as a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions did bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of Subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note did the list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not.[*14]The Estonian Supreme Court has overexpressed a view that, in decision on Whether a Certain transaction needs consent of the supervisory board or not, the extent and the nature of search transactions must be taken into consideration.[*15]

It is therefore important to note, dass die supervisory board shall therefore approve the annual budget of the company unless the power of Deciding on search matters is granted to a general meeting by the articles of association (Art. 317 (7)).

HOWEVER, the meaning and content of the duty to supervise and monitor the actions of the management board is not CLEARLY stipulated in law. Art. 317 (7) CC foresees did the supervisory board has the right to obtain information Concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law thus foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has therefore been Described in Estonian legal literature: it has neither the competence nor the Possibility of suspending the activities of the management board.[* 16]

In addition to that, Art. 317 (6) of the CC stipulates did the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activities of the company with the law, the articles of association, and resolutions of the general meeting. HOWEVER, the law does not include the clear standard of supervision. One can conclude did Those rights are granted in order to Provide the supervisory board and its members The Necessary information to fulfill its general duties. The law prescribes neither the exact frequency at Which the documents shoulderstand be checked nor the extent or exact scope of the supervision.

Unlike the management board, being a body did carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. .According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held When Necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been Considered Mainly as a controlling body - Art. 111 (1) of the German Stock Corporation Act stipulates did a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too. . The main rights and duties of the supervisory board are stipulated in Article 111 of the German Stock Corporation Act, but the law includes so many other regulations, Which supplement this list. For Example, to Art. Gemäß 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). .According to Art. 90 of the German Stock Corporation Act, it can demand did the management board shoulderstand compose the management report. .According to Art.

Unlike Estonian law, the German Stock Corporation Act CLEARLY distinguishes between the duties of the management board

and the supervisory board. Art. 111 (4) of the German Stock Corporation Act stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been overexpressed in German legal literature did the clear distinction and to organizational differentiation between the competence to take decisions as regards everyday actions and to supervise Those actions derives from the idea did each of the bodies acts unabhängig and is separately responsible for fulfilling its obligations.[* 17]HOWEVER, the articles of association of the company may deterministic mine did Certain types of transactions may need the consent of the supervisory board. This is Considered as a Possibility for the supervisory board to participate in managing the company and THEREFORE Directly affect the management decisions (in addition to the Possibility of advising the management board).[* 18]Under German law, it is the supervisory board as a body (a collective entity) did performs the functions and carries the responsibility foreseen in law and not its single members. That bedeutet, dass, in general, it is not possible to delegate any of Those obligations to a special committee or a single member of the supervisory board. HOWEVER, it is possible for some actual monitoring activities to be Carried out by special committees of the supervisory board.[* 19]

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been Discussed. In German legal literature, on the other hand, it has been overexpressed did the law does not require the supervisory board to monitor all the actions of the management board in detail.[* 20]The supervision is Considered Sufficient and reasonable When the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the Developments and business events did are disc losed by the management board;
- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;
- is Convinced did the management board is properly composed and its members are Appropriate for fulfilling Their obligations;
- is Convinced did the members of the management board co-operate properly and did all the management tools, (ie, business planning, accounting, and reporting), as well as the company's organization, meet the requirements;
- Ensures did the management board fully Complies with its reporting obligation Pursuant to Article 90 of the German Stock Corporation Act;.[* 21]

- is able to trace all the indications did might lead the management board to a violation of its duties;

- in any case of significant Deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material Deviations as regards Those indicators in Comparable companies, examines Whether Those Deviations are justified and Whether the management board Responds perform adequately.[*22]

Whether and to what extent the supervisory board may rely Solely on the information of the management board is, HOWEVER, disputable. There are different opinions in German legal literature about the question of Whether monitoring actions of the supervisory board Should be extended to subordinate levels where the management decisions are taken.[*23]Some authors are of the opinion did Sufficient monitoring Means, in general, did the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board.[*24]Some authors explain, dass die supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. HOWEVER, it has been stressed, dass die supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.[*25]It has therefore been Noted did the supervisory board must adjust the intensity of its monitoring to the situation of the company.[*26]The supervisory board has an obligation to interfere, Which bedeutet, dass if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the Appropriate evidence must Ensure did the supervisory board or the responsible person deals with the matter.[*27]

It has been overexpressed did When the company is in crisis, so but in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more Actively.[*28]In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must Ensure the existence of adequate organization of the reporting system and intensify the monitoring When Particular circumstances arise - For Example, if there are any indications did the existence of the company is threatened.[*29]After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and

must file for bankruptcy. Has the supervisory board discovered did the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is Considered to be liable for breaching its duties alongside the management board.[* 30]

The law does not Provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been overexpressed in legal literature did all transactions did Considered are particularly important still need the supervisory board's approval.[* 31]

.According to German legal literature, in case of upcoming decision of a supervisory board can be Considered unjustifiable and unacceptable, any diligent member of a supervisory board is not only obliged to vote against it but so has an obligation to Explicitly reject the decision and point out reservations, DEPENDING on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.[* 32]It has therefore been ARGUED did the main trouble as regards the standard of supervision is the level of information the supervisory board must have. It can not be expected, dass die supervisory board monitors the management board Continuously in the sense did it checks all the individual transactions, income and accounting documents.[* 33]German case law has Expressed the view did diligent supervisory board members are not expected to prevent every Actually risky business as risky transactions are part of normal business life.[* 34]

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and accor ding to this commission the members of the supervisory board who cause damage to the company by violation of Their obligations shall be jointly and severally liable for compensation for the damage caused. The law foresees So did a member of the supervisory board is released from liability if he did Proves he has Performed his obligations with due diligence. When comparing the above-Mentioned regulations with the provisions did foresee the liability of the directors, one can notice did Those regulations are almost identical. In Estonian legal literature,[* 35]This raises the question of how one can distinguish the liability of the supervisory board from the

liability of the directors and Whether it is enough to ascertain did the directors have breached Their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German stock corporation are very similar to the regulations of the Estonian CC. Article 116 (1) of the German Stock Corporation Act stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the German Stock Corporation Act, Which Regulates the duty of care and the liability of the management board, Applies mutatis mutandis.[* 36]The law emphasises did the members of the supervisory board are, in Particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law thus stipulates did the members of the management board are, in Particular, obliged to compensate for the damage did Arises from unreasonable remuneration.

In German legal literature, it has thus been explained 'that, though the provisions did regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are silent lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'Appropriate' application Of Those regulations.[* 37]

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a Necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be Caused by the breach of obligations of the member of the supervisory board. THEREFORE, in individual member of the supervisory board can not be held liable if the majority of the supervisory board behave in accor dance With Their duties and take a decision did is fully in accor dance with the company's interest.[* 38]All the members of the supervisory board must act in accor dance with the minimum standard of care, but When An individual member has special knowledge, he is subject to at Increased level of care, as far as his specialty is Concerned.[* 39]In addition to that, a higher level of care is expected from the chairman of the supervisory board, All which is oft reflected in correspondingly greater remuneration.[* 40]

It can be Concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in respect did. The authors are of the opinion THEREFORE that, in consideration of the essential similarity between the management system of Estonian and German public limited

companies, similar interpretation of the scope of the obligations of the supervisory board members would be justified. It is important to note did Estonian legal practice shoulderstand definitely avoid setting Significantly higher standards When interpreting the scope of Those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyzes the powers and duties of the members of the supervisory board, a question Arises: what might be the specific cases When the members of the supervisory board can be held liable for Causing damage to the company? Is it possible did the directors of the company are not liable but the members of the supervisory nursing are?

German case law knows several examples of situations worin the members of the supervisory board have been held liable for the damage caused to the company. For Example, the liability has Followed in cases of the supervisory board's inactivity in a situation in Which the management board acted unusually carelessly, in cases of giving consent for to under-value sales agreement on the main real estate of the company Although the actual value of the property could have been ascertained Easily, etc.[*41]

German case law is therefore of the opinion 'that' in the case of transactions did are of Particular importance to the company Because of Their scope, the risks associated with them, or Their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgment. This therefore includes a regular risk analysis.[*42]

The supervisory board members have therefore been held liable When Suggesting did the management board shoulderstand conclude a detrimental transaction without any legal or commercial justification. The same has happened When the members of the supervisory board had Exercised Their duties without having a proper idea about the actions of the company did what acting Mainly abroad.[*43]

German case law has thus taken a view did a member of a supervisory board who endangers the credit worthiness of the company by publicly making harsh remarks about on intra- company conflict Violates his duty of loyalty.[*44]

The foregoing analysis shows did German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, HOWEVER, the issues related to the liability of the supervisory board are silent Relatively new.

The Estonian Supreme Court has recently Nevertheless made two decisions as regards the liability of the supervisory board members, but

the authors of this paper are of the opinion did the standard of diligence and the meaning of 'proper supervision' have shut Remained unclear.

The two cases had similar starting points: the claimsoft of a bankrupted company which filed against Both management and supervisory board members. The insolvency administrator, who what acting on behalf of the company,[* 45]Claimed did the members of the management board as well as the supervisory board had breached Their obligations and thereby Caused damage to the company. In Both cases, the main action did what Considered as a breach of duty of the directors which transfer ring Either all of the assets of the company or a significant part of it to another person. Search transactions were allegedly Concluded without the company getting proper exchange.

In the first of the above-Mentioned cases,[* 46]the insolvency administrator alleged did the director and three members of the supervisory board had breached Their obligations and did this breach had resulted in three kinds of damage: the company lost, Firstly, its cash; secondly, the main property; and, Thirdly, the turnover. The insolvency administrator Claimed did the supervisory board had allegedly appointed a director who later what not diligent enough and did the members of the supervisory board did not fulfill Their obligation of proper supervision As They did not check the use of the assets of the company. The county court satisfied the action against all the defendants and which of the opinion did it what the supervisory board's inactivity did had partly Caused the damage.[* 47]At the appeal court, the action Remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained 'did the functions of management and supervisory boards are different: as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court Expressed the view that, Although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable.[* 48]

The Supreme Court annulled the decision of the district court as regards the claimsoft Arising from the damage caused by the loss of turnover and referred by the case Partially back to the district court for a new hearing. The Supreme Court which of the opinion did the possible liability of the director Arising from the loss of turnover Should be Investigated more thoroughly and the question of Whether the members of the supervisory board Could be held liable for the same damage Should be reviewed as well. The Supreme Court Agreed with the district

court, HOWEVER, that, as a rule, the members of the supervisory board can be held liable only in cases worin the members of the management board have breached Their obligations.[* 49]Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. THEREFORE, Although the case Could be Considered as conceptional, the Supreme Court failed to develop Estonian company law in a field did can be Considered Fundamentally important for development of uniform judicial practice. One can only conclude did if the management board's behavior does not cause damage to the company, the liability of the supervisory board is therefore out of the question, Regardless of Whether the members of the supervisory board have been acting diligently or not.

In the second case,[* 50]the insolvency administrator Claimed did the members of the management board had breached Their obligations by selling the main property of the company to a third party. The sales agreement stipulated did the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator which of the opinion did search actions were not in accor dance with the business judgment rule and did the transaction what Economically unjustified. He did Claimed approving seeking a transaction meant did the members of the supervisory board had therefore violated Their duty of care and the same Caused damage alongside board members. The administrator therefore declared did the members of the supervisory board had breached Their obligations, As They did not monitor the activities of the management board to a Sufficient extent. Had They Fulfilled Their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been Prevented. The members of the supervisory board ARGUED thatthey Could not be held liable for the actions of the management board as They had no knowledge of the allegedly harmful transaction and did the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained did the supervisory board as a body had never taken any decision as regards Those questionable transactions. The Supreme Court explained 'that, as the supervisory board had never passed a resolution approving the harmful transaction, it Actually never Directly DECIDED to conclude it.[* 51]The Supreme Court Nevertheless emphasised did individual members of the supervisory board Could quietly have breached Their duties If They

knew did the management board what about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (Either through the Directly or chairman).[* 52]

The Supreme Court therefore stressed did the members of the supervisory board Could not be held liable only Because theywere aware of the harmful transaction did the members of the management board had Concluded. The Supreme Court annulled the decision of the appeal instance and referred by the case back to the district court for a new hearing. The Supreme Court Instructed the district court did on the new hearing, it shoulderstand ascertain Whether the defendants had had the Possibility of taking steps to prevent the damaging transaction being Concluded and did If They had had the Possibility of Avoiding the damage, They Should be held liable for the Consequences.[* 53]

The Supreme Court justified the annulment of the decision of the court of appeal with the factthat the appeal court allegedly failed to consider Whether the defendant as a member of the supervisory board which aware of the harmful nature of the transaction. The Supreme Court therefore Noted did if he had had the above-Mentioned knowledge, he shouldhave Exercised the supervision more diligently.

In general, this approach can be Considered justified, but the authors of the article are of the opinion did the above-Mentioned reasoning of the Supreme Court and the instructions given to the court of appeal for a new hearing seem to be contradictory. On the one hand, the Supreme Court Explains did no member of a supervisory board can be held liable only on the basis of an accusation did he hasnt provided enough supervision of the actions of the management board. On the other hand, the Supreme Court orders the court of appeal to ascertain Whether the members of the supervisory board Could have Prevented the harmful actions (meaning Whether They had provided enough supervision).

The authors of the article note did in assessment of breach by Both management and supervisory board members, the main principle is did one can not conclude did a director or a member of the supervisory board breached his obligations only Because The outcome could adversely. Any court decision must include the Explanations Of Those differences, and if the court finds did a director has breached his duties, the court shoulderstand explain how the defendant shouldhave been acting instead.[* 54]The question has a member of a supervisory board Fulfilled his obligations or violated them can not be perform adequately Assessed by looking for an answer to the abstract question of Whether the supervision what Sufficient. Although the case is pending silent, the Supreme Court shouldhave given some guidelines to the district court as regards the application of business judgment rule When Establishing the

liability of the supervisory board members. When assesing the fulfillment of the obligations and Establishing the infringement by the members of the supervisory board, one must compare the standard of action (ie, what the members of the supervisory board shouldhave done) to the actual steps taken (ie, What They Actually did).[*55]

The authors of the article are of the opinion that 'insufficient supervision' itself is not a breach of duties. The actual breach That should be Assessed in discussion of the Possibility of holding the supervisory board liable is an improper action taken by the supervisory board, or inactivity When it shouldhave acted instead. The breach of one's duties can be Considered as a 'performance gap', and it can only be ascertained via comparing the actions taken to thosethat shouldhave been taken. The main principle about the liability of the members of the supervisory board can not be ascertained Significantly differently from did about the liability of the directors.

4. Conclusions

The authors are of the opinion did neither Of Those two decisions of the Supreme Court as a matter of fact answers to the question, what is the actual liability standard of a member of a supervisory board. Both decisions lack the proper application of the business judgment rule, and this approach contradicts the previous approach the Supreme Court has taken When assesing breach of duties of the directors. It is important to note, dass die breach of duties by a member of a supervisory board as well as by a director can be established only by comparing the bond with the actual behavior of the person in question. The above-Mentioned decisions might give the false impression THEREFORE did the factthat a director has breached his obligations Means automatically did the members of a supervisory board must have therefore breached Their obligations, as obviously the supervision hasnt been Sufficient. This conclusion is unjustifiable HOWEVER - the breach of the obligations of the management board can not be Considered as the only prerequisite of the liability of the supervisory board.

The analysis therefore Showed did the powers and obligations of the supervisory board of Estonian and German public limited companies are quite similar and THEREFORE it would be reasonable to take the view points overexpressed in German legal literature and case law at least, as a general Example When interpreting Estonian legal regulations. One can conclude THEREFORE did the breach of duties of the supervisory board must be Assessed separately, with application of the business judgment rule similarly to 'that' in the situation worin breach of duties of the directors is Assessed. The law does not require the supervisory board to monitor all the actions of the management board in

detail, and the standard of supervision depends heavily on the circumstances. In the case of the directors of the company having breached Their duties,

Notes:

*1 In Estonia, similarly to other EU member states, there are two types of limited-liability companies: public limited company (aktsiaselts) and private limited company (osaühing). See also: M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company'], master's thesis. Tartu 2006, p. 7th

*2 About the legal theories of a legal person, lake, For Example, K. Saare.Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine (delimitation of the legal personality of the private legal Legal Person) [in English: Delimitation of the legal subjectivity of the private legal person], doctoral thesis , Tartu of 2004.

*3 So there are some countries within Europe did allow public limited companies to choose between the two models (eg, France and Belgium). M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company], master's thesis. Tartu 2006, pp. 28, 37, 97- 98th

*4 UK Companies Act 2006. Available at link

*5 J. Rickford. Fundamentals, Developments and trends in British company law - some reflections resist. First part: Overview and the British approach. - European Company and Financial Law Review 1 (2004) / 4 (December), p. 405th

*6 AF Conard. The supervision of corporate management: A comparison of Developments in European Community and United States law. - Michigan Law Review 82 (1984), pp. 1459-1488.

*7 See Article 30 of the Stock Corporation Act (AktG;... Share of 6 September 1965 (Federal Law Gazette I p 1089), which (under Article 8 of the Law of 11 April 2017 I, p 802) has been changed Available at. link).

*8th See Article 52 of the German Law on Limited Liability Companies Limited Liability Companies Act (GmbHG;. Law on limited liability companies in the Federal Law Gazette Part III, classification number 4123-1, revised version published, most recently by Article 8 of the Law of 10 has been amended in May 2016 (Federal Law Gazette I, p. 1142)).

*9 H. Fleischer, W. Goette (ed.). Munich commentary on Limited Liability Companies Act. Verlag CH Beck Munich. 2nd edition 2016 - Spindler § 52, para. 14th

*10 Commercial Code. Adopted on 15 February 1995. - RT I 1995, 26/28, 355; RT I 22.06.2016 (in Estonian). Come After 'CC'.

[*11] Until June 1996, Art. 189 (1) of the CC stipulated did a supervisory board is compulsory for every private limited company did has share capital did Exceeds 400,000 kroons, more than 20 Shareholders, or more than 100 employees during at accounting year. Until 1 January 2011, a supervisory board which compulsory for every private limited company with share capital of more than 25,000 euros and with fewer than three members of the management board.

[*12] The use of German law as a source for comparison can therefore be justified by the view, Expressed by the Supreme Court of Estonia, did on many occasions the German legal system serves as a model not only for legal regulations but then, as An example for courts for the interpretation of the relevant law. See CCSCd 3-2-1-145- 04, para. 39th

[*13] About the strategic management, maritime additionally K. Saare, U. Volens, A. Vutt, M. Vutt. Ühinguõigus I. Kapitaliühingud ['Company Law I: Limited Companies']. Tallinn: Juura 2015 mn. 1846th

[*14] .According to Art. 317 (2), the articles of association may, HOWEVER, prescribe did the consent of the supervisory board shall not be required or is required only in the cases specified in the articles. The articles of association may therefore prescribe other transactions for the conclusion of Which the consent of the supervisory board is required. The articles of association may therefore grant the supervisory board the right to decide on other issues did not are Placed within the competence of the management board or the general meeting Pursuant to law or the articles of association.

[*15] CCSCd 3-2-1-9-16, para. 36; CCSCd 3-2-1-26-17, para. 13th

[*16] K. Saare et al. (Note 13), mn. 1864th

[*17] W. Goette, M. Haber bag, pp Kalss. Munich Commentary on the Act. Verlag CH Beck Munich. 4th Edition 2014. - Habersack, AktG § 111 para. 96th

[*18] *ibid* , Rn. 96th

[*19] *ibid* , Rn. 49th

[*20] W. Hölters (ed). Stock Corporation Act. Comment. Verlag CH Beck Munich. 2nd edition 2014 - Hambloch-Gesinn / Gesinn, para. 11

[*21] Art. 90 of the Stock Corporation Act stipulates the list of different reports the management board is obliged to present to the supervisory board. They include eg reports about the Intended business policy of the company, fundamental questions of business planning (in Particular financial, investment and personnel planning), profitability of the company (in Particular the profitability of its equity), the course of business, the situation of the company as a whole, and transactions Which can be of Considerable importance for the profitability or liquidity of the company.

[*22] W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

[*23] U. Hüffer, J. Koch. Beck'scher short comments. Band 53. Stock Corporation Act. CH Beck Munich, 12th Edition, 2016. - Koch, § 111, Rn. 4

[*24] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

[*25] W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

[*26] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

[*27] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 33rd

[*28] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 Rn 37th

[*29] U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 15th

[*30] BGH: validity of the payment ban from entering the insolvent. - NZG 2009, 550 BGH, judgment of 16. 3. 2009 - II ZR 280/07 (OLG Dresden).

[*31] U. Hüffer. Corporate Law. 7th edition. CH Beck 2007 S 285; U. Hüffer, J. Koch (Note 23). - Hüffer, cooking, § 111, Rn 45th

[*32] M. Henssler. L. Strohn. Corporate Law. Beck's brief comments. 3. Edition. Verlag CH Beck, Munich 2016 - Henssler AktG § 116 para. 11th

[*33] Reichard: burden of proof in damages trial of the Supervisory Board. Stuttgart Higher Regional Court, decision of 19.06.2012 - 20 W 1/12, legally (LG Tübingen), BeckRS 2012 14126. - GWR 2012 491st

[*34] BGH: Liability of a Director in a mass society. - NJW 1977, 2312. BGH, judgment of 4 7. 1977 - II ZR 150/75.

[*35] K. Saare et al. (Note 13), mn. 1886-1890.

[*36] The only exception is did the regulations about the insurance of the management board members against risks Arising From Their professional activities do not apply.

[*37] U. Hüffer, J. Koch (Note 23). - Hüffer, § 116, para. 1

[*38] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 29th

[*39] BGH: Liability of management and supervisory board of a public company. - CCZ 2012, 76. BGH, judgment of 20. 9. 2011 - II ZR 234/09.

[*40] W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 37th

[*41] U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

[*42] D. Lorenz: Duty to separate risk analysis for supervisory board members - Piëch. - GWR 2012, 156. Stuttgart Higher Regional Court, judgment of 29.02.2012 - 20 U 03/11 (LG Stuttgart).

[*43] This decision is, HOWEVER, Considered problematic. See U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

[*44] D. Lorenz (Note 42).

[*45] .According to Art. 315 (4) and Art. 327 (4), in the case of declaration of bankruptcy of a company, only to insolvency administrator has a right to file a claim on behalf of the company.

[*46] CCSC 3-2-1-113-16.

[*47] CCSC 3-2-1-113-16, para. 6th

[*48] CCSC 3-2-1-113-16, para. 9th

[*49] CCSC 3-2-1-113-16, para. 25th

[*50] CCSCd 3-2-1-152-16.

[*51] CCSCd 3-2-1-152-16, para. 17th

[*52] .According to Art. 321 (1) of the CC, a meeting of the supervisory board shall be called by the chairman of the supervisory board or by a member of the supervisory board Substituting for the chairman.

[*53] CCSCd 3-2-1-152-16, para. 19th

[*54] . The general obligation of proper reasoning for the court decision derives from Art 436 (1) of the Estonian Code of Civil Procedure (Code of Civil Procedure, ADOPTED on 04.20.2005 - RT I 2005, 26, 197;. RT I, 28.12 .2016), Which stipulates did a court judgment shall be lawful and reasoned. The requirement of reasoning bedeutet, dass the judicial reasoning must be understandable, traceable, and associated with the circumstances thathave been Identified by the court in this specific matter. This specific procedural requirement of judicial decisions as a prerogative of a lawful court decision has been several times overexpressed in Estonian case law: see, for instance, CCSCd 3-2-1-13-17, para. 15; CCSCd 3-2-1-42-16, para. 13-15; CCSCr 3-2-1-70-15, para. 20; CCSCd 3-2-1-129-15, para. 15, etc.

[*55] The same principle is applicable in assessment of breach of duties of the member of the management board (see CCSCd 3-2-1-129-15, para. 15).

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Court supervision of the determination of the votes at the First General Meeting of Creditors in Bankruptcy Law Estonian

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Abstract

Estonia's first Bankruptcy Act which passed in 1992 and has been under Continuously amendment. Estonian bankruptcy law has provided three distinct procedures for the determination of votes at the first general meeting of creditors: 1) in 1992 to 2003, the votes were deterministic mined only by the trustee; 2) in 2004-2009, the votes deterministic mined by the trustee were approved by the court; and 3) under the current law, the court intervenes only if there is a dispute over the determination of the votes. All the amend ments notwithstanding, the process of deterministic mining the votes under Estonian bankruptcy law remains problematic. The current procedure for the determination of the votes at the first general meeting of creditors does not protect the rights and interests of the creditors, protect the common interests of the creditors, or follow the principle of procedural economy. The law shoulderstand Provide a term did specifies the time by which court rulings on the determination of the votes shoulderstand be made. Thereby, important decisions Could be ADOPTED at the same general meeting, and bankruptcy proceedings Could continue. Further More, to Ensure did disputes are resolved within reasonable time and did the principles of speed and efficiency are Honored, insolvency courts Should be created.

There is therefore the problem-of deterministic mining Which issues belong to the disputes about votes. A creditor assigned votes must file proof of claimsoft, together with documents proving the circumstances, with the trustee in three working days. For protecting the

creditors' interests and Ensuring a fair and equitable system, the trustee, in co operational with the court, has the right and obligation to verify and evaluate the documents substantiating the claimsoft, in order to prevent unjustified claims from conferring control over the bankruptcy proceedings.

Keywords: court supervision; determination of votes; first general meeting of creditors; bankruptcy proceedings; the principle of speed and efficiency; proof of claimsoft; common interests of the creditors; protection of the creditors' interests; procedural economy; insolvency court

1. Introduction

Creditors' votes have supreme power in bankruptcy proceedings. The creditors have a right to take decisions in the proceedings by using Their votes. Those decisions are Adopted By a simple majority of the votes of the creditors participating in the meeting. The decisions put to a vote at the first general meeting (hereafter FGM) of creditors constitute the most important issues in the proceedings. These decisions influence the status of the Subsequent proceedings, and sometimes this effect may deterministic mine the general direction of the proceedings. Hence, it can be said that the process of deterministic mining creditors' votes in bankruptcy proceedings is crucial. HOWEVER, as in many other countries, in Estonian bankruptcy law the process of deterministic mining the votes is problematic.

Estonia's first Bankruptcy Act which passed 25 years ago, in 1992, and has been amended Continuously. In addition to undergoing several minor amend ments, the Bankruptcy Act which amended in its Entirety in 1996, 2003 and in 2009.[*1]Estonian bankruptcy law has provided three distinct procedures for the determination of votes at the FGM of creditors: 1) the votes are deterministic mined only by the trustee; 2) the votes deterministic mined by the trustee are approved by the court; or 3) under the current law, the court intervenes only if there is a dispute over the determination of the votes.

One of the main issues over the years, Which there havebeen Attempts to resolve, is the trouble of deterministic mining the votes before the defense of claims. This problem-what Recognized already in 1993-1994, for the amount of the claimsoft is not clear before the defense of the claim.[*2]HOWEVER, the number of votes of each creditor corresponds to the amount of the creditor's claimsoft. During preparation of the Bankruptcy Act, it stated what did the main object of the law is to protect the creditors' interests.[*3]Hence, questions arise as to Which procedure for determination of the votes at the FGM of creditors is in the

creditors' best interests and what should be the scope of court supervision in keeping with the principle of procedural economy.

In drafting of the Bankruptcy Act, the legislator's objective what did the workload of the courts would be as small as possible. Since the creditors' claims are satisfied out of the bankruptcy estate, They shouldhave been given decision-making power. In drafting of the Bankruptcy Act, the court which entrusted with resolving issues did needed to independent decision-maker.[*4]One of thesis is the issue of the determination of the votes. HOWEVER, since the decisions put to a vote at the FGM deterministic mine the future course and status of the proceedings, the court and the trustee Both play in important role in protecting the common interests of the creditors.

Hence, the law does not set in place clear regulations on how to deterministic mine the votes. The disputes are long-term, Because there is no regulation of When the court shoulderstand render its ruling on the determination of the votes so did the FGM Could continue. There is therefore no regulation addressing disputes Which Should be resolved in the proceedings related to the determination of the votes and disputes Which Should be resolved in the proceedings related to the defense of the claim.

The objective with this article is to find the answer to the Following questions: does the current procedure for the determination of the votes at the FGM of creditors protect the rights and interests of the creditors, Which procedure was the best in 1992-2015, does the current procedure protect the common interests of the creditors, and does it follow the principle of procedural economy?

2. Court supervision of determination of the votes at the FGM of creditors in 1992-2015

2.1. The scope of court supervision in 1992-2003

Since 1992, Estonian bankruptcy law has provided many, different regulations. This stems from the factthat When Estonia regained independence, in the turbulent situation of 1992, a new legal order based on comparative law, on the experiences and legal concepts of other countries, had to be created Quickly. A completely Call new bankruptcy law had to be developed[*5], Whereas Estonian civil law has Largely Germanic and Swedish roots.[*6]

The most important reference source for developing Estonia's first Bankruptcy Act[*7]what the Swedish Bankruptcy Act[*8th], As the concept of the determination ofthe votes at the FGM of creditors. .According to § 26 (4) of the BA in 1992, the creditors' votes are deterministic mined by the trustee. .According to subsection 5 of the same provision, if a creditor does not agree on the votes, the votes are deterministic mined by the

general meeting of creditors. If the creditors do not agree with the meeting's decision, theyhave the right to file a complaint to the court (§ 27 1 (3) of the BA 1992). HOWEVER, if the court passes judgment did the general meeting's decision which not justified, then the court Declares the general meeting's decision invalid and the votes are deterministic mined by the court.

Notwithstanding the existence of disputes over the determination of the votes, the general meeting of creditors what Entitled to adopt decisions (§ 27 (2) of the BA 1992). If the court Decided to decide on a number of votes did differed from the votes deterministic mined by the general meeting and this would have resulted in a different decision being ADOPTED, the court declared this decision invalid at the creditors' or trustee's request (27 1 (3) of the BA 1992).

Similarly to Estonian bankruptcy law in force from 1992 to 2003, Chapter 15, Section 3 (3) of the current Finnish Konkurssilaki[*9]Provides did in the event of disagreement, the estate administrator or, if the matter is Discussed at the creditors' meeting, the chairperson Decides on the voting strength conferred by a claim. This indicates did the commission on the determination of the votes in the FGM of creditors did what in the Estonian BA in 1992-2003 is possible today.

Although the FGM Could continue and votes Could be deterministic mined at the same meeting, the factthat the bankruptcy trustee deterministic mined the number of votes at at early stage Essentially alone what Considered problematic. The confirmation of the votes deterministic mined what not done by the court as to independent person. HOWEVER, it is incomprehensible why the regulation which Considered problematic, Because, to gemäß § 29 (3) of the BA in 1992, the trustee must be independent of the debtor and the creditor. More over, the court has not confirmed the votes deterministic mined by the trustee since 2010. The same rules and the reasons thatwere the basis for the amendment of the law turned out to be inaccurate.

Further More, the procedure had to be amended Because The votes assigned to the creditors deterministic mined the power relations between them in the bankruptcy proceedings.[*10]When a dispute arose, the procedure wurde time-consuming and complex. This, in turn, Could lead to the cancellation of the general meeting's decision. THEREFORE, it what Decided to amend the Bankruptcy Act.

2.2. The scope of court supervision in 2004-2009

In 2004-2009, the procedure for determination of votes specified in the Bankruptcy Act[*11]what radically amended. The bankruptcy judge what Involved in the procedure for the determination of the votes. The judge resolved disputes over the votes and thus confirmed the votes

deterministic mined by the trustee. HOWEVER, a question arose as to Whether the judge's confirmation that there were no disputes Necessary When over the votes.

If a creditor participating in a general meeting did not agree with the number of votes assigned, the votes were deterministic mined by the judge participating in the meeting (§ 82 (4) of the BA 2004). In seeking cases, the court resolved the dispute and verified Whether there what Sufficient basis for the determination of the votes. The law did not prescribe a deadline for the ruling.

So the court made the ruling When there were no disputes over the votes (§ 82 (5) of the BA 2004). The court confirmed the number of votes deterministic mined by the trustee. HOWEVER, applying the regulation which rather a formality, Because in fact the court did not verify the proof of claimsoft, on Which basis the votes were deterministic mined. The court thus did not verify Whether the trustee deterministic mined the votes in accor dance with the principles of protecting the creditors' interests and equal treatment. Nevertheless, the Supreme Court pointed out 'that' in the case of resolving disputes over the votes as well as in the case of Confirming the votes, the court shoulderstand verify the requirements prescribed in § 82 of the BA.[* 12]Since court supervision of Confirming the votes deterministic mined by the trustee was a formality, the act which amended again.

2.3. The scope of court supervision since 2010

Since 2010, the procedure for the determination of the votes which supposed to be simple so did bankruptcy proceedings would go smoothly.[* 13].According to § 82 (3) of the BA[* 14], The number of votes for each creditor participating in the FGM of creditors is deterministic mined by the trustee. .According to subsection 4 of the same provision, if a creditor does not consent to the votes as assigned, the votes are deterministic mined by a ruling of the judge participating in the general meeting. An appeal may be filed against seeking a ruling. HOWEVER, the law does not Provide clear rules for resolving disputes over the determination of the votes. Further More, judges participating in the general meetings implement Section 82 (4) of the BA in different ways, Which leads to non-uniform court practice. HOWEVER, it is unclear When the judge will make the court ruling did Enables the meeting to continue. Nevertheless, quick and effective proceedings Ensure the protection of the creditors' rights and interests.

The current BA does not stipulate Which disputes Essentially belong to the procedure of determination of the votes; HOWEVER, the Supreme Court has Significantly Influenced the development of the bankruptcy law.[* 15]The Supreme Court stated in case 3-2-1-144-11 did the determination of the number of votes Could not be resolved in a dispute

did what by nature a dispute over the acceptance of claims. On the other hand, the court stated did search Claims Could be excluded as obviously and for reason of Their legal nature can not be satisfied in the proceeding. The court gave as An example did the question of the expiry of the claimsoft can not be resolved in the context of disputes over the votes. HOWEVER, proofs of claim with formal deficiencies can be disputed, as can proofs of claimsoft in the case of Which there have been some legal changes.[* 16]The Supreme Court's position must be Honored. Otherwise, the bankruptcy proceedings are extended Significantly, All which is in conflict with the principles of speed and efficiency of proceedings.

Nevertheless, irrespective of the Supreme Court's opinion, most disputes over the determination of the votes are, by nature, disputes over the acceptance of claims. In practice, the number of disputes over the determination of the votes at the FGM has Decreased since the Supreme Court's ruling in case 3-2-1-144-11. The ruling may have Contributed to uniform application of the bankruptcy law, as in many cases the law does not give an explicit answer.[* 17]On the other hand, the ruling may lead the trustees to fear did any dispute over the determination of the votes may be a substantive dispute. HOWEVER, if at objection is not submitted When Necessary, the creditors' interests may be Harmed.

Further More, When a dispute Arises, court supervision is quite minimal. HOWEVER, § 82 (4) of the BA, related to disputes over the determination of the votes, has Remained unchanged since 2004. The court will be involved only in the event of a dispute over the determination of the votes and exercises supervision over the lawfulness of bankruptcy proceedings. So the court may deny the right to vote, deterministic mine the total number of votes, or restrict the number to a partial amount.

In practice, judges do not implement the provisions of § 82 (4) of the BA properly and do not make the ruling at the same general meeting. .According to a literal interpretation of the law and in line with the legislator's objective, the number of votes assigned via a court ruling Should be deterministic mined immediately at the same meeting. The time it takes to make a ruling depends on the judge. Further More, in practice, the FGM does not take place When there are disputes over the determination of the votes. THEREFORE, bankruptcy proceedings can not continue, Because important decisions are not ADOPTED.

The concept of the determination of the votes by the court undercurrent bankruptcy law is based on the German Insolvency Act[18](InsO). .According to §77 (2) of the Insolvency Act, the judge makes the decision about the determination of the votes immediately at

the same meeting. In order for Estonian bankruptcy law to be Applied in accor dance with the legislator's objective, the commission for the court ruling on the determination of the votes Should be rephrased: It Should be unambiguous, understandable, and applicable by each judge. The law shoulderstand prescribe When the court ruling shoulderstand be issued in cases of disputes. Pursuant to the legislator's objective, the ruling shoulderstand be made immediately at the same FGM of creditors.

On account of the above, in 1992-2003 the problem-what did the creditors' votes were deterministic mined only by the trustee. In 2004-2009, the confirmation of the deterministic mined votes was a so-called formal process, in Which the court did not verify the basis for the determination of the votes. THEREFORE, § 82 (5) of the BA which declared invalid. THEREFORE, currently the votes are again deterministic mined by the trustee, Which was found problematic in 1992-2003, and the court intervenes only in the event thatthere is a dispute.

HOWEVER, a question Arises as to Whether the legislator made a reasonable decision by changing § 26 (5) of the BA as in force in 1992. It prescribed did if a creditor does not accept the votes, the number of votes is deterministic mined by the general meeting of creditors, and this enabled the meeting to continue. HOWEVER, in consideration of § 82 (4) of the current act, the trouble may in practice result from the factthat judges are not Implementing the law Pursuant to the legislator's objective. It has been stated in the literature did problems encountered in the implementation of the bankruptcy law can be divided into two groups: problems did can be solved by Means of interpretation and problems did can be solved only by amendment of the law.[* 19]Current practice indicates dass die solution is to amend the law.

The law shoulderstand prescribe the term for the court ruling. HOWEVER, there is therefore the problem-of Which issues belong to the sphere of disputes over the votes. The nature of disputes over the votes can not be stated in legislation, so it must be established by court practice. Prescribing the term by law and making court practice uniform Enables Ensuring the creditors' rights and interests while thus rendering the proceedings quick and effective.

3. The basis for determination of the number of votes

If a creditor submits the proof of claimsoft together with documents proving the circumstances to the trustee, a dispute over the determination of the votes does not arise. HOWEVER, in practice, there are a lot of problems related to Which documents must be submitted for Obtaining votes at the FGM.

Creditors assigned votes at the FGM must file proper proof of claim with the trustee on time. Pursuant to § 94 (1) of the BA, the trustee

is Notified of a claim by proof of claimsoft. The proof of claimsoft shoulderstand set out the content of, basis for, and amount of the claimsoft and Whether the claimsoft is secured by a pledge. Documents proving the circumstances specified in the proof of claimsoft Should be Annexed thereto. .According to subsection 3, When the proof of claimsoft is not properly prepared, the trustee grants a term of at least 10 days for elimination of the deficiencies. When the deficiencies are not eliminated nonetheless, the general meeting of creditors may deem the proof of claimsoft not to have been submitted.

Although the law Provides formal requirements for the proof of claimsoft, in cases of more complex legal relationships, the creditor shoulderstand therefore substantiate the proof of claimsoft in order to obtain votes from the trustee at the FGM. Nevertheless, the Supreme Court has taken a different position on Which documents Should be filed with the trustee before the FGM of creditors.

The Supreme Court has stated, in civil case 3-2-1-8-15, dass die proof of claimsoft filed shoulderstand Provide information about the claimsoft's content and basis and shall so state the amount of the claimsoft and Whether it is secured by a pledge. The Supreme Court thus stated that, DEPENDING on the circumstances, it may be Appropriate to annex the documents proving the claimsoft (ie, Which substantiate the claimsoft), in order to avoid ambiguity and Subsequent disputes. Despite the factthat terms are given in the law, the Supreme Court states did if documents proving the circumstances are not Annexed to the proof of claimsoft, there is no basis for the general meeting of creditors to deem proof of claimsoft not to have been submitted , The documents proving the claimsoft may be submitted up to the time of the court proceedings for the defense of the claim.[* 20]

The author of this article does not agree with the Supreme Court's position. To obtain votes at the FGM of creditors, the creditor must submit all documents proving the claimsoft. Otherwise, the creditor may obtain votes and have at important position in the bankruptcy proceedings while possibly not, in fact, having a claim against the debtor. It is not - and can not be - the legislator's objective to assign votes to a creditor who has not proved the claimsoft against the debtor.

Article 55 (1) of the BA, the trustee protects the rights and interests of all creditors and of the debtor and Ensures a lawful, prompt, and Further More, Pursuant to financially reasonable bankruptcy procedure. Protection of the creditors' interests is the trustee's common obligation.[* 21]The trustee can not deterministic mine the votes unless the proof of claimsoft is Sufficiently substantiated: it must be clear, understandable, and verifiable. Pursuant to §235 of the Code of Civil Procedure[* 22](CCP)

of substantiation of allegation Means giving the court reasons for that allegation so that, presuming did the reasoning is correct, the court can deem the allegation to be plausible. The creditor must eliminate potential conflicts and Ensure Sufficient clarity of the proof of claimsoft. The creditor is required to submit all the information Necessary for the trustee to identify the claimsoft. The trustee must be able to make sure Readily Whether the creditor has a claim against the debtor. Unclear proof of claimsoft is not justified by § 94 (1) and § 82 (4) of the BA, and, Hence, the creditors have no just cause to obtain the votes.

Further More, the essential documents supporting the claimsoft Should be submitted to the trustee not later than three working days before the general meeting, to give the trustee Sufficient time to verify Whether the proof of claimsoft corresponds to the requirements prescribed by § 94 (1) of the BA. Otherwise, the term for verifying the documents would not be prescribed in the law. .According to § 94 of the BA, it is an important element of the proof of claimsoft did it must be supplemented with documents proving the circumstances.

Because of the above, a creditor assigned votes at the FGM must submit proper proof of claim to the trustee in three working days. This gives the trustee Sufficient time to verify Whether the claimsoft is in accor dance with the requirements prescribed by law. In addition to formal requirements pertaining to the proof of claimsoft, documents proving the specified circumstances must be Annexed thereto, for avoidance of disputes over the votes.

4. The efficiency aspect: Implementation of the principles of speed and efficiency in making the ruling on the determination of the number of votes

The purpose of civil procedure is to guarantee adjudication of civil matters by the court within a reasonable period of time (§ 2 of the CCP). Bankruptcy proceedings shoulderstand therefore be Conducted as Quickly and Efficiently as possible. The proceedings Should be Addressed and resolved in a orderly, quick, and efficient manner and with minimal costs.[*23]In the literature, it has been stated did quick bankruptcy proceedings are effective.[*24]Accordingly, the question of how to Arises Ensure fast and effective proceedings in cases of disputes over the determination of the votes, with the aim of protecting the creditors' rights and interests.

The bankruptcy proceedings can be Carried Out Quickly if there are no disputes over the votes. HOWEVER, Achieving ideal bankruptcy proceedings is difficult. As Mentioned before, in a case Involving a dispute, the time for making the ruling about the votes may differentiate, DEPENDING on the judge. Some county court judges take a break at the FGM of creditors and deterministic mine the votes immediately.

HOWEVER, other judges deterministic mine the votes at the general meeting follow-up, Which might take place in the same week or even a few months later. In the interim period, the meeting will generate rally not be continued and decisions will not be ADOPTED. If an appeal is made against seeking a ruling to the district court and to the Supreme Court, the FGM will not be continued until the ruling is in force. HOWEVER, When the meeting will continue despite the dispute over the vote, this may give rise to another dispute. .According to § 83 (1) of the BA, the court may, if the creditors' common interests are Harmed, revoke the decisions ADOPTED.[* 25]

The author of this article can cite some cases Involving the determination of the votes in Estonian practice. The objective for presenting the cases is to indicate how long the process of determination of the votes by a judge Could be. A lenghty process of determination of the votes makes bankruptcy proceedings inefficient, Whereas the proceedings Should be as quick as possible.

In civil case 2-10-59818, a dispute over the determination of the votes which appealed to the Supreme Court. The FGM of creditors Took place on 02/02/2011. Creditors Participating in the meeting did not agree with the number of votes assigned by the trustee. Harju County Court made a ruling on the determination of the votes on 2.3.2011.[* 26]Since Harju County Court dismissed the appeal, it sent what to Tallinn District Court, Which issued a ruling on 28.6.2011.[* 27]The ruling which therefore appealed to the Supreme Court. The Supreme Court made a ruling in case 3-2-1-144-11 on 01.10.2012 and sent the case back to the county court for a new hearing.[* 28]The county court made a ruling within two weeks after the general meeting, but the district court issued its ruling about four months after the county court's ruling. The Supreme Court's ruling, in turn, which made almost six months after the ruling of the district court. In this case, It took almost one year to resolve the dispute over the determination of the votes. This duration for seeking a Fundamentally important dispute as did over determination of the votes, on Which the Entire future of the bankruptcy proceedings depends, is in conflict with the principles of speed and efficiency.

Further More, in civil case 2-13-32716, worin the FGM of creditors which held on 23.10.2013, the trustee did not deterministic mine the votes for some creditors, and Harju County Court made a ruling on the matter on 05.11.2013.[* 29]This was two weeks after the first meeting of creditors what hero. The creditor appealed against the ruling to Tallinn District Court, Which issued its ruling about the votes on 31.3.2014.[* 30]

In civil case 2-13-13251, the FGM of creditors which held on 02.04.2014. The trustee deterministic mined the votes for each creditor

proportionally to the amount of the creditor's claimsoft Pursuant to § 82 (1) of the BA. The creditors filed an appeal against the votes assigned, on the basis of § 82 (4) of the BA. Harju County Court made a ruling on 02.20.2014.[*31]This was two weeks after the first meeting of creditors what hero. An appeal which filed with the district court. Tallinn District Court made a ruling on 05.10.2014, in accor dance with Which the county court's ruling which not changed.[*32]The ruling which appealed to the Supreme Court. Harju County Court's decision came into force on 06.10.2014. THUS, this civil case which settled four months after the FGM of creditors.

In civil case 2-15-13938, the FGM of creditors Took place on 24.11.2015 and on 12.11.2015. The court deterministic mined the votes on 18.12.2015, Because some creditors did not agree with the votes deterministic mined by the trustee.[*33]One of the creditors filed an appeal against the ruling. HOWEVER, the court refused to accept did appeal on 02/17/2016.[*34]The court stated at the FGM did the meeting would continue When the court ruling Enters into force. Although the ruling Entered into force on 03.12.2016, the court DECIDED did the FGM of creditors what to take place on 06/17/2016. Hence, even though the ruling about the votes Entered into force on 03.12.2016, the FGM which silently held three months later.

Although only a few cases are presented in this article, They Provide Sufficient proof did the determination of the votes is a long-term process. It can, HOWEVER, be said that since 2011 the amount of time taken for settling disputes over the votes deterministic mined has Decreased. Nevertheless, by the time the ruling has come into force, some important deadlines might have passed. THEREFORE, it would be wise to specify a term within Which the county court, district court, and Supreme Court must resolve disputes over the determination of the votes and deterministic mine the date for the FGM of creditors. After all, the legislator's objective what did the votes be deterministic mined by the county court ruling immediately, at the same meeting.

Further More, the creation of Specialized insolvency courts, Which has therefore been Considered for establishment in the Estonian insolvency law, might help to enhance the efficiency of insolvency proceedings.[*35]The World Bank has drawn attention to the factthat insolvency courts Ensure quick proceedings, Which, in turn, enable Obtaining the best value for the property.[*36]The Cork Committee too opines did bankruptcy courts are important.[*37]The bankruptcy courts do not have a heavy workload of other civil cases, and urgent disputes over the determination of the votes Could be resolved within reasonable time. THEREFORE, with the existence of bankruptcy courts, a case Could be

settled 'ASAP', Which would Ensure did the principles of speed and efficiency of the procedure are Followed.

On account of the above, the court must Ensure prompt and effective bankruptcy proceedings, to resolve the dispute within a reasonable amount of time. In accor dance with the legislator's objective, the ruling about the votes shoulderstand be made at the same FGM immediately, When the dispute Arises. A major trouble in court practice may be resolved by prescribing the term in the act did states When the dispute shoulderstand be settled, so did the judges would implement the commission properly. Further More, to Ensure did disputes are resolved within reasonable time and did the principles of speed and efficiency are Followed, insolvency courts Should be created. Doing so protects the common interests of the creditors.

5. The fairness aspect: The creditors' real purpose in submitting the proof of claimsoft

As Mentioned above, in accor dance with § 94 (1) of the BA, a creditor wishing to have the right to vote at the FGM of creditors is required to submit proper proof of claimsoft three working days before the meeting. Nevertheless, Although the creditors may have submitted a proper claimsoft, its purpose might be contrary to the objective of bankruptcy proceedings and to good faith. HOWEVER, in the literature it has been stated did legal rules as rules did regulate human behavior Should be based on the most important idea of the law - on justice.[*38]Further More, ius est ars boni et aequi.[*39]

In spite of that, some creditors may participate in insolvency proceedings in order to adopt decisions at the creditors' meeting whereby They fully wrong obtain funds recovered during the insolvency proceedings. In civil case 3-2-1-27-15, the Supreme Court stated did creditors can not be allowed to contest the votes for tactical reasons. This would lessen the Possibility of carrying out the bankruptcy proceedings within a reasonable period of time and of protecting all the common interests of the creditors by Means of smooth proceedings.[*40]

Pursuant to § 138 (1) of the General Part of the Civil Code Act[*41], Rights are to be Exercised and obligations are Performed in good faith. Even in application of provisions did are not in direct conflict with the legislation, acting for seeking a purpose may be unlawful. This is confirmed by § 138 (2) of the General Part of the Civil Code Act: a right shall not be Exercised in to unlawful manner or with the objective of Causing damage to another person. So, § 200 (1) of the CCP prescribes did a participant in a proceeding is required to exercise the procedural rights in good faith, and subsection 2 states did participants in a

proceeding and Their Representatives or advisers are not allowed to abuse Their rights, delay the proceeding, or mislead the court.

Further More, if the creditor is a person connected with the debtor as defined in §117 of the BA, it is justified to apply stricter requirements for verification and substantiation of the claimsoft. In the case of related-party transactions as well as in circumstances worin the transaction is made by one and the same person, the trustee must pay more attention to the verification and determination of the votes (Harju County Court ruling No. 2-13- 32716, from 12/05/2013). In the literature, it has even been stated did specific terms on the determination of the votes assigned to persons connected with the debtor Should be imposed. HOWEVER, Estonian bankruptcy law does not prescribe specific regulation on creditors connected with the debtor.

Consequently, in order to reach the objective of the law, the trustee, in co-operation with the court, has the right and obligation to verify and evaluate the documents substantiating the claimsoft in order to prevent unjustified claims (For Example, due to ostensible transactions) from conferring control over the bankruptcy proceedings. A system did is fair and equitable on to the creditors must be enforced.

6. Conclusions

In conclusion, Estonian bankruptcy law has had three totally different regulations on the determination of the votes at the FGM of creditors in bankruptcy proceedings. In 1992-2003, the problem-what did the creditors' votes were deterministic mined only by trustee. THEREFORE, in 2004-2009 the judge what Involved. HOWEVER, the confirmation of the votes deterministic mined was a formal process, in Which the court did not verify the bases for the determination of the votes. Hence, nowadays the votes are again assigned by the trustee, Which had been found problematic in 1992-2003. More over, the court intervenes only in the event of a dispute over the determination of the votes. HOWEVER, the disputes are long-term, and, THEREFORE, the FGM of creditors is held several months or even a year after the initial FGM. In contrast, bankruptcy proceedings Should be as quick and efficient as possible. The current procedure for the determination of the votes at the FGM of creditors does not protect the rights and interests of the creditors, does not protect the common interests of the creditors, and does not follow the principle of procedural economy.

Hence, current legislation on the determination of the votes at the FGM of creditors is not perfect. HOWEVER, none of the regulations thathave been in force since 1992 have been perfect as regards the protection of the creditors' common interests and the principle of efficiency. In fact, It Seems did the legislator did not make a reasonable decision by changing § 26 (5) of the BA as in force in 1992. That provision

prescribed did if a creditor does not consent to the number of the votes assigned, the votes are deterministic mined by the general meeting of creditors. This regulation did Ensured the meeting Could continue immediately. It did protect the creditors' common interests, Because The bankruptcy proceedings Could continue. HOWEVER, in case of a dispute, the decisions ADOPTED Could be changed by the judge. THEREFORE,

Considering § 82 (4) of the current BA, one finds did the actual trouble in practice results from the factthat judges are Implementing the law in a way did Deviates from the legislator's objective. The court must Ensure prompt and effective bankruptcy proceedings, to resolve the dispute within reasonable time. The ruling on the votes shoulderstand be made immediately at the same FGM. THEREFORE, the law shoulderstand Provide a term did specifies the time by which court rulings on the determination of the votes shoulderstand be made. Important decisions THUS ADOPTED Could be at the same general meeting, and bankruptcy proceedings Could continue. Further More, to Ensure did disputes are resolved within reasonable time and did the principles of speed and efficiency are Honored, insolvency courts Should be created.

There is therefore the problem-of deterministic mining Which issues belong to the disputes about votes. HOWEVER, as the nature of the disputes over the votes can not be stated in the law, it must be established by court practice. In order to reach the objective of the law, the trustee, in co-operation with the court, has the right and obligation to verify and evaluate the documents substantiating the claimsoft in order to prevent unjustified claims from conferring control over the bankruptcy proceedings. A creditor assigned votes at the FGM must file proof of claimsoft, together with documents proving the circumstances, with the trustee in three working days. In order to protect the creditors' interests, a fair and equitable system must be employed.

Notes:

[*1] P. Varul. Maksejõuetuse areng Eestis ['Developments in insolvency law in Estonia']. - Juridica 2013/4, p. 234 (in Estonian).

[*2] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica 1993/3, p. 52 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica1994 / 1, p. 6 (in Estonian).

[*3] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying remarks on the law of bankruptcy']. - Juridica 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['elucidatory notes on the bankruptcy law']. - Juridica 1994/1, p. 2 (in Estonian).

[*4] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. - Juridica 1994/1, pp. 5-6 (in Estonian).

[*5] P. Varul (see Note 1), p. 234th

[*6] M. Käerdi. Estonia and the new civil law. - HL MacQueen, A. Vaquer, S. Espiau (eds). Regional Private Laws and Codification in Europe. Cambridge 2003, p. 250. - DOI:link

[*7] Pankrotiseadus. - RT 1992, 31, 403 (in Estonian).

[*8th] P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying remarks on the law of bankruptcy']. - Juridica 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['elucidatory notes on the bankruptcy law']. - Juridica 1994/1, p. 2 (in Estonian). P. Varul. On the development of bankruptcy law in Estonia. -Juridica International 1999 (IV), p. 173rd

[*9] *Konkurssilaki* , - 120/2004 (in Finnish).

[*10] IX Riigikogu shorthand. VIII istungijärk. 15. Pankrotiseaduse esimene eelnõu (1085 SE) lugemine ['Report of the proceedings of the IX Riigikogu. VIII session. 15. The first reading of the bill of the Bankruptcy Act ']. available atlink (Most recently Accessed on 03/23/2016) (in Estonian).

[*11] Pankrotiseadus. - RT I 2003, 17, 95; RT I 2009, 11, 67 (in Estonian).

[*12] CCSCr 21.4.2005, 3-2-1-42-05, para. 14. Available atlink (Most recently Accessed on 03/23/2017) (in Estonian).

[*13] P. Varul (see Note 1), p. 235th

[*14] Pankrotiseadus. - RT I 2003, 17, 95; RT I, 22.06.2016, 25 (in Estonian).

[*15] P. Varul (see Note 1), p. 235th

[*16] CCSCr 01.10.2012, 3-2-1-144-11, para. 14. Available atlink (Most recently Accessed on 03/23/2017) (in Estonian).

[*17] P. Varul (see Note 1), p. 235th

[*18] Insolvency Code of 5 October 1994. - BGBl. I p. 2866 (in German).

[*19] P. Varul. Pankrotiõiguse probleeme ['Issues Concerning bankruptcy law']. -Juridica 1999/8, p. 376 (in Estonian).

[*20] CCSCr 04.08.2015, 3-2-1-8-15, para. 12. Available atlink (Most recently Accessed on 03/23/2017) (in Estonian).

[*21] P. Varul. Nõuetest pankrotimenetluses ['claims in bankruptcy proceedings']. -Juridica 2004/2, p. 98 (in Estonian).

[*22] Tsiviilkohtumenetluse seadustik. - RT I 2005, 26, 197; RT I, 28.12.2016, 22 (in Estonian).

[*23] United Nations Commission on International Trade Law (UNCITRAL). Legislative Guide on Insolvency Law, p 12. Available atlink (Most recently Accessed on 06/12/2015).

[*24] T. Saarma. Pankrotimenetluse põhimõtted. ['The principles of bankruptcy law']. - Juridica 2008/6, p. 353 (in Estonian).

[*25] CCSCr 04.15.2015, 3-2-1-27-15, para. 14. Available atlink (Most recently Accessed on 03/23/2017) (in Estonian). CCSCr 06.10.2015, 3-2-1-59-15, para. 12. Available atlink(Most recently Accessed on 03/23/2017) (in Estonian).

[*26] Ruling of Harju County Court 2-10-59818 (in Estonian).

[*27] Ruling of Tallinn District Court 2-10-59818 (in Estonian).

[*28] CCSCr 01.10.2012, 3-2-1-144-11.

[*29] Ruling of Harju County Court 2-13-32716 (in Estonian).

[*30] Ruling of Tallinn District Court 2-13-32716 (in Estonian).

[*31] Ruling of Harju County Court 2-13-13251 (in Estonian).

[*32] Ruling of Tallinn District Court 2-13-13251 (in Estonian).

[*33] Ruling of Tallinn County Court 2-15-13938 (in Estonian).

[*34] Ruling of Tallinn County Court 2-15-13938 (in Estonian).

[*35] P. Varul (see Note 1), p. 236th

[*36] The World Bank. Principles and Guidelines for Effective Insolvency and Creditor Right Systems. April 2001 pp. 56-57. available atlink (Most recently Accessed on 06/12/2015).

[*37] K. Kerstna-Vak. Järelevalve pankrotimenetluses ['supervision over bankruptcy proceedings'], p. 52. Master's thesis, Tartu, 2005 (in Estonian).

[*38] R. Narits. Õiguse entsüklopeedia ['Law Encyclopaedia']. Juura 2004, p. 11 (in Estonian).

[*39] R. Narits (ibid.).

[*40] CCSCr 04.15.2015, 3-2-1-27-15, para. 14th

[*41] Tsiviilseadustiku üldosa seadus. - RT 2002, 35, 216; RT I, 12.03.2015, 106 (in Estonian).

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